

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2138.

722

No. 15, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA ON THE RELATION
OF HERMAN KNIGHT, APPELLANT,

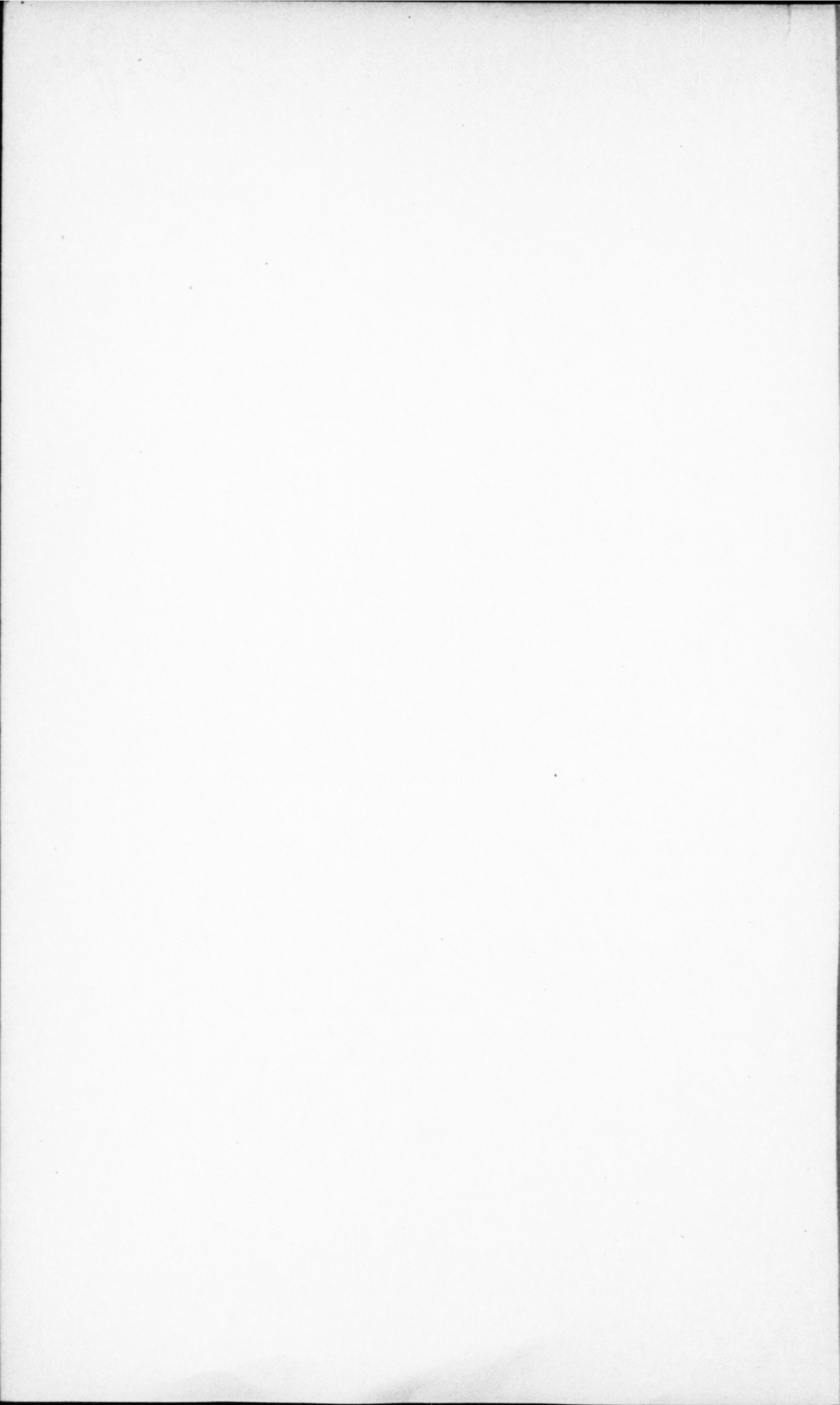
vs.

RICHARD A. BALLINGER, SECRETARY OF THE DEPART.
MENT OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 18, 1910.

May 4
Anderson



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2138.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Appellant,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior.

a Supreme Court of the District of Columbia.

At Law. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of
Columbia, at the city of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had in the above-entitled cause, to wit:

1 *Petition, &c.*

Filed July 16, 1909.

In the Supreme Court of the District of Columbia, — Term, 1909.

51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Department of the Interior,
Defendant.

To the Honorable — —, Justice of said Court:

Your relator Herman Knight, respectfully states as follows:
He is a citizen by blood of the Cherokee Nation and enrolled upon

the approved roll of citizens by blood of said Nation as No. 16,760, age 26, as of September 1, 1902, and as quantum of blood, $\frac{1}{4}$ Cherokee, as is more fully shown by a certificate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A."

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of town-sites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the Cherokee Nation to which Eva Waters belongs and the right of Eva Waters to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C., or in the Supreme Court of the United States, and is not yet adjudicated.

Under the rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contest instituted in the office of the Commissioner to the Five Civilized Tribes was proceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 10, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day, a copy of which decision is hereto attached and marked Exhibit "C."

On May 11, 1909, the Secretary of the Department of the Interior

directed the Chief of the Cherokee Nation, whose duty it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery, as is more fully shown by a telegram in words and figures as follows, to-wit:

4 "29 Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May 11th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Miner Waters contestants given including fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

11.35 A. M.

Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Secretary of the Department of the Interior a deed properly executed by the Chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the
5 title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of

the Interior Department touching the selection of lands in allotment in the Cherokee Nation, and after the 11th day of May, 1909, the Secretary of the Interior authorized and empowered your relator to have his tenant proceed with the development of said above described premises for the purposes of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon the said lands and has already laid out and expended large sums of money in

6 prosecuting an effort to produce oil and natural gas from underneath the said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject-matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to refuse to deliver said deed to your relator upon the ground, as your relator is informed and believes from official notices received from the Secretary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things

7 in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

THOMAS WHITE,

Attorney in Fact.

ZEVELY, GIVENS & SMITH,

Att'ys for Pl'ff.

STATE OF OKLAHOMA,

Muskogee County, ss:

Thomas White, of lawful age, being first duly sworn according to law on his oath states: that he is the attorney in fact for the relator in the above petition for a writ of mandamus and that he knows the contents of said petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief and as to such matters alleged upon information and belief he believes them to be true; and that he has signed the name of the said Herman Knight to the said petition as the act and deed of the said Herman

Knight under the authority of a power of attorney of said Herman Knight.

THOMAS WHITE,
Attorney in Fact.

Subscribed and sworn to before me this 13 day of July, 1909.

CHESTER A. COWPER,
Notary Public.

[SEAL.]

My commission expires Dec. 16, 1909.

8

EXHIBIT "A."

Department of the Interior.

Commissioner to the Five Civilized Tribes.

Cherokee Roll, Indians by Blood.

| Number. | Name. | Age. | Sex. | Blood. | Census card No. |
|---------|----------------------------------|------|------|---------------|-----------------|
| 16760 | Knight, Herman (age, twenty-six) | 26 | M. | $\frac{1}{4}$ | 7017 |

This is to certify, that I am the officer having custody of the approved roll of citizens by blood of the Cherokee Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 16760.

Enrolled as of September 1, 1902.

P. O. Vinita, Oklahoma.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

L. B. A., *Clerk.*

Muskogee, Oklahoma.

July 13, 1909.

9

EXHIBIT "B."

Rules of Practice in Choctaw, Chickasaw, and Cherokee Allotment Contest Cases Before the Commission to the Five Civilized Tribes, the Commissioner of Indian Affairs, and the Secretary of the Interior.

Department of the Interior.

Commission to the Five Civilized Tribes.

MUSKOGEE, INDIAN TERRITORY, *March 17, 1903.*

The following Rules of Practice in Choctaw, Chickasaw and Cherokee Allotment Contest Cases, approved by the Department, January

27, 1903, and March 9, 1903, are hereby promulgated for the information and guidance of all concerned.

THE COMMISSION TO THE FIVE CIVILIZED
TRIBES.

TAMS BIXBY, *Chairman.*

Rules of Practice.

Initiation of Contests.

10 RULE 1. Contests may be initiated by or on behalf of an adverse claimant against any party by or for whom a selection of land has been made in the Choctaw, Chickasaw or Cherokee Nations, for any sufficient cause affecting the right of possession of the land in controversy, by selecting the same land, and by filing a complaint with the Commission to the Five Civilized Tribes at the land office in the Nation in which the land lies.

RULE 2. When the allottee is deceased the contest shall be brought against the heirs of such deceased allottee, and the complaint shall state the names of all the heirs. If the heirs, or any of them, are non-residents of Indian Territory, or unknown, the complaint shall set forth the fact and be corroborated with respect thereto by the affidavit of one or more persons.

RULE 3. The complaint must conform to the following requirements:

- (a) It must be written or partly written and partly printed.
- (b) It must describe the land involved.
- (c) It must state the land office where, the date when, and for whom, the contestant selected said land.
- (d) It must make party contestee the person who, by himself or through another, originally selected the land in controversy and state the date of such selection and by whom made.
- (e) If the contestee is an infant or a person of unsound mind the complaint shall so state and shall also state the name of the guardian of such infant or person of unsound mind, if there
11 be one, and if there be none the complaint shall state the name of the person having the infant or person of unsound mind in charge.
- (f) It must set forth the facts which constitute the grounds of contest.
- (g) It must be duly verified.

Notice of Contest.

RULE 4. At least thirty days' notice shall be given of all hearings before the Commission, unless by written consent an earlier day shall be agreed upon.

RULE 5. Notice of contest and summons must be made upon the blanks prepared and supplied by the Commission and must give a description of the land involved, state the time and place of the hearing, and, except in cases of notice by publication, have a copy of the complaint attached.

Service.

RULE 6. Personal service shall be made in all cases where the party to be served is a resident of Indian Territory, except as provided in Rule 9 and shall consist in the delivery of a copy of the notice and summons to each of the contestees.

RULE 7. If the person to be personally served is an infant or a person of unsound mind, service shall be made by delivering a copy of the notice and summons to the guardian of such infant or person of unsound mind, if there be one. If there be none, then by deliver-

12 ing a copy to the person having the infant or person of unsound mind in charge, and also to the person who made the selection for such infant or person. And if the contestee is a prisoner, convict, aged and infirm person, or soldier or sailor of the United States on duty outside of the Indian Territory, service shall be made as herein otherwise provided, and a copy of the notice and summons shall also be served on the person who made the selection for such prisoner, convict, aged and infirm person, soldier or sailor.

RULE 8. Personal service may be executed by any officer or person.

RULE 9. Notice may be given by publication only when it is shown by affidavit presented on behalf of the contestant, and by such other evidence as the Commission may require, that due diligence has been used, and that personal service cannot be made or that the person to be served is a non-resident of Indian Territory, or that the heirs of a deceased allottee against whom the contest is brought are unknown. The affidavit must also state the present post office address of the person intended to be served, if it is known to the affiant, and must show what effort has been made to obtain personal service.

Notice by Publication.

RULE 10. Notice by publication shall be made by advertising at least once a week for four successive weeks in some newspaper published in the nation where the land in contest lies. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

13 RULE 11. Where notice is given by publication, a copy of the notice shall, at least thirty days before the day fixed for the hearing, be mailed by registered letter to each person to be notified at the last address, if any, given by him, as shown by the records of the Commission, and to him at his present address named in the affidavit for publication required by Rule 9, if such present address is stated in such affidavit and is different from his record address. If there be no such record address, and if no present address is named in the affidavit for publication, then a copy of the notice shall be so mailed to him at the post office nearest to the land. A copy of the notice shall also be posted in the land office where the contest is pending for a period of at least thirty days before the day fixed for the hearing, and still another copy thereof

shall be posted in a conspicuous place on the land for at least two weeks prior to the day fixed for the hearing.

Proof of Service of Notice of Contest and Summons.

RULE 12. Proof of personal service of notice of contest and summons shall be the written acknowledgment of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place and manner of service.

RULE 13. Where service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

14 Proof of service by mail and by posting a copy of the notice on the land shall be the affidavit of the person who mailed the notice, with the post office receipt for the registered letter attached thereto, and the affidavit of the person who posted the notice on the land.

Dismissals.

RULE 14. Cases will be called for trial on the day and at the hour fixed for the hearing, and if the contestant makes no appearance the case will be dismissed for want of prosecution, in which event written notice of such action, by personal service or registered letter, shall be given by the Commission to the parties in interest or their attorneys.

Continuances.

RULE 15. A postponement of a hearing to a day to be fixed by the Commission may, for a valid reason, be allowed on the day of trial; and when the continuance is asked for on account of the absence of material witnesses, the party asking for the continuance shall file an affidavit showing:

(a) That one or more of the witnesses in his behalf is absent without his procurement or consent.

(b) The name and residence of each absent witness.

(c) The facts to which they would testify if present.

(d) The materiality of the evidence.

15 (e) The exercise of proper diligence to procure the attendance of the absent witnesses.

(f) That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

RULE 16. No continuance shall be granted on account of the absence of witnesses when the opposing party shall admit that the witnesses would, if present, testify to the statements set out in the motion for a continuance.

Trials.

RULE 17. Upon the trial of a contest the Commission will, in all cases when deemed necessary, personally direct the examination of witnesses in order to draw from them all facts within their knowl-

edge requisite to a correct conclusion of any point connected with the case.

RULE 18. Due opportunity will be allowed opposing parties, or their counsel, to confront and cross-examine the witnesses introduced by either party.

RULE 19. Upon the day originally set for hearing and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken, unless the parties, or their counsel, shall, by stipulation in writing, agree that the transcript of the stenographer's notes, duly verified, shall be considered the testimony of the witnesses with the
16 same force and effect as if it had been signed by the witnesses.

Reinstatement, Rehearing, and Review.

RULE 20. Motions for reinstatement, after dismissal as provided in Rule 14, and for rehearing or review, must be filed within twenty days from service of notice of the final order or decision in case of personal service of said notice and within thirty days in case of service of said notice by registered letter, said motion first having been served on the opposite party or his attorney, either personally or by registered letter. The party on whom the motion is served will be allowed the same length of time after service of motion in which to file a reply, service thereof first having been had on the opposite party, or his attorney, either personally or by registered letter.

RULE 21. Motions for rehearing or review must be accompanied by an affidavit of the party or his attorney to the effect that the motion is made in good faith and not for the purpose of delay.

RULE 22. In case of failure to file a motion to reinstate, or for rehearing or review, within the time prescribed by Rule 20 the case will be regularly closed.

Proof of Service of Motions, Replies, etc.

RULE 23. Proof of personal service of motions, replies, etc., shall be the same as that required by Rule 12. Proof of service of motions, replies, etc., by registered letter shall be the affidavit of the person who mailed the letter, with the post office receipt therefor attached, and said affidavit shall state that the letter
17 for which the receipt was given contained a copy of the original motion, etc., as the case may be. And in all cases of service by registered letter, the time allowed for filing motions, replies, etc., shall begin to run from the date of the post office receipt for said letter.

Witnesses.

RULE 24. All costs incident to the attendance of witnesses in proceedings in allotment contest cases shall be paid by the respective parties to the contest by whose request they have been subpoenaed.

Appeals to the Indian Office and the Department.

RULE 25. Appeals from the final order or decision of the Commission lie, in every case, to the Commissioner of Indian Affairs and from his decision to the Secretary of the Interior, and twenty days will be allowed for appeal and argument from date of service of notice of the decision in case of personal service, and thirty days in case of service by registered letter. All appeals and arguments must be served on the opposite party, or his attorney of record, either personally or by registered letter, within the time allowed for appeal, and appellee shall have the same length of time after service of appeal and argument in which to file a reply and to serve the same or a copy thereof on the appellant or his attorney of record. When an appeal is considered defective the party or his attorney will be notified of the defect and if not amended within
18 fifteen days from the date of service of such notice the appeal may be dismissed by the officer to whom the appeal is taken. [All appeals and arguments, and replies thereto, must be filed with the Commission for transmission to the officer to whom the appeal is taken.]* Notice of all decisions must be served upon the attorney of record, and time will begin to run from such notice.

Ruled out portion of Rule 25 amended, under Departmental instructions of November 7, 1905, as follows:

All appeals, and arguments in connection therewith, and replies thereto, must be filed in the office wherein the decision to be affected by such appeal was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the office to which the appeal is taken.

Motions for Rehearings and Reviews.

[RULE 26. Motions for rehearing, or for review of decisions of the Indian Office, or of the Department, and replies thereto, must be served, and filed with the Commission, as provided in Rule 20.]*

Rule 26 amended under Departmental instructions of November 7, 1905, as follows:

RULE 26. Motions for rehearing, or for review of decisions of the Indian Office or of the Department, and replies thereto, must be served as provided in Rule 20, and filed within the time provided in that rule, in the office wherein the decision to be affected by the motion was made, or in the office of the Commissioner to the Five Civilized Tribes for transmission to the officer to whom the motion is addressed.

* [Matter enclosed between brackets erased in copy.]

19

EXHIBIT C.

(Copy.)

Department of the Interior,
Washington.

Office of Indian Affairs.

Received May 12, 1909.

WILLIAM J. TWIST, Contestant,
vs.
EVA WATERS, a Minor, Contestee;
also
HERMAN KNIGHT, Contestant,
vs.
EVA WATERS, Contestee.

The Commissioner of Indian Affairs.

SIR: The land involved in these cases is fifty acres of valuable oil land situate near Tulsa, Oklahoma. It is being drained and wasted by nearby wells on adjoining lands. Eva Waters is a minor child, born between the 1st day of September, 1902, and the 4th day of March, 1906. Through her father and mother she made application to the Department for an allotment of the entire fifty acre tract to her. Her application was contested by Twist, he claiming adverse to her the west twenty acres of the said fifty acres. Her application was also contested by Herman Knight, he claiming adverse to her, the other thirty acres. The contestants and contestee are Indians belonging to the Cherokee tribe, each having a small quantum of Indian blood.

20 The act which went into effect on the 27th day of July, 1908, removed all restrictions from all three of these Indians. Therefore as soon as the land is allotted and patents are issued, the jurisdiction of the Interior Department ceases, and the property, to whomsoever it goes, whether contestants or contestee, is absolutely beyond the control of the Department. The Department retains jurisdiction solely for the purpose of perfecting the allotments and preserving and protecting the land from waste, pending the final determination of the allotment and issuing of patents.

A trial was had in the case of Twist vs. Waters before the Commissioner to the Five Civilized Tribes, and he rendered judgment in favor of Twist. An appeal was taken from his judgment to the Commissioner of Indian Affairs, and his judgment was reversed. The case has been appealed to the Department and is now ripe for determination upon its merits.

No trial has been had in the case of Knight vs. Waters. It is probable that many months would be consumed before a trial could

be had of this case upon its merits before the Commissioner to the Five Civilized Tribes and his decision rendered and an appeal then taken to the Commissioner of Indian Affairs, and an appeal then taken to the Department, which would finally determine the issue in the case. It is uncertain when this case could be determined upon its merits, and in all probability, in view of the value of the land and the great interest that has arisen over the particular land, it would be at least twelve months before the case could be
21 finally determined upon its merits. No person can at this time foresee the outcome of the trial of this suit.

The immediate question to be determined is whether or not this Department will approve a relinquishment, by the minor through her guardian, of her rights in the controversies.

On the 6th day of April, 1909, there was filed with the Commissioner to the Five Civilized Tribes, in the case of Twist against Waters, a motion on behalf of Waters to be allowed to confess judgment in favor of Twist. In this motion, C. W. Waters and Maudie Waters, the father and mother of the minor child, acting as guardians of the minor, proposed that she be permitted to retire from the case upon payment for her use of the sum of \$4800.

On the same day, to-wit:—April 6th, 1909, in the case of Knight against Waters, a motion was filed by the minor, through C. W. Waters and Maudie Waters, father and mother and guardian of the minor, to be permitted to confess judgment in favor of Knight upon payment for her use of the sum of \$7200.

The Commissioner to the Five Civilized Tribes recommends that the proposed compromise be approved and that the girl receive the \$12,000 and relinquish her claim to the entire fifty acres of land, provided no better offer can be obtained.

The merits of the controversy between the two contestants and the contestee have not been presented in this hearing for determination. Indeed, the case of Knight vs. Waters could not at this time be presented.

22 Mr. A. W. Clapp, an attorney of Muskogee, appeared a few days ago, representing the guardian of the minor, and contended that the offer of \$12,000 should be accepted.

Mr. A. R. Serven, of the firm of McGowan, Serven and Mohun, appeared at the same time, claiming to represent the legal guardian of the minor, and contended that a better settlement than \$12,000 could be secured for the minor. At the time of hearing the Department was, and now is, of the opinion that the offer of \$12,000 should not be accepted, and so announced to the two attorneys, and to other attorneys who represented the interests of oil men in and around Tulsa.

Since the hearing, the Little Rock Oil Company, P. J. White, Thomas White and W. J. Lewis, through their attorney, J. W. Zevely, have offered to pay the minor \$25,000 for a relinquishment of her claim and an award of the land to the respective contestants.

Since the hearing Mr. Serven has secured on behalf of the legal

guardian of the minor an offer from the Olympus Oil Company, which is embodied in full in a paper filed in the Department on the 8th day of May, 1909.

The questions for the Department to determine now are two (1) Will this minor child be permitted to withdraw? The uncertainty of the outcome of this controversy is so overbearing upon the Department that it concludes that a reasonable compromise of her rights should be accepted. (2) The next question, therefore, to determine is as to which of these two propositions before us should be approved by the Department.

23 By the first proposition the minor child gets \$25,000 in cash. The only condition imposed is that the land should be awarded to the contestants instead of the contestee, and as I understand it the controversy has narrowed itself down to such narrow limits that it is simply a question as to which of the three parties may have the land. If the minor is to be permitted to withdraw, there is no legal objection standing in the way of awarding the thirty acres to Knight and the twenty acres to Twist, and patents be issued to them speedily. As to the second proposition, before it can be made effective it involves the determination of these cases upon their merits, which is, to say the least, an uncertain issue, and in the meantime the land is being wasted and drained.

I have therefore decided to approve the \$25,000 proposition, to permit the minor to withdraw her contest, and to award the land to Twist and Knight, respectively.

It seems to me that the Department ought, in so far as it can, to control and direct the disposition of the \$25,000. I am therefore of the opinion that the \$25,000 should be paid over to the Secretary of the Interior, as trustee, to be paid by him to a trust company as the guardian of the girl, if a proper one can be found, or if not, to such guardian as will be approved by the Department.

In accepting this offer the Department will insist that the fund shall not be diminished by any charges upon it for attorney fees.

Mr. Zevely's clients will be given up to and including the 15th instant to make the payment of the \$25,000.

(Signed)

FRANK PIERCE,
First Assistant Secretary.

May 10, 1909.

24 Endorsed on back as follows:

Land 36515-09.

Department of the Interior,
Office of Indian Affairs,
Washington, D. C.,
May 12, 1909.

Respectfully Referred to the Commissioner to the Five Civilized Tribes for appropriate action.

(Signed)

JOHN FRANCIS, JR.,
Acting Chief Land Division.

Rule to Show Cause.

Filed July 16, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior,
Defendant.

Upon consideration of the petition filed herein, it is this 16th day of July, 1909, ordered that the Respondent show cause on or before the 23rd day of July, 1909, why the writ of mandamus should not issue as prayed in said petition; *Provided*, a copy of this order is served on him within five days before said date.

JOB BARNARD,
*Associate Justice.**Marshal's Return.*

Served copy of the within rule to show cause on Richard A. Ballinger, Secretary of the Department of the Interior, by service on Frank Pierce, acting secretary.

July 16, 1909.

AULICK PALMER, *Marshal.*
S.*Motion to Dismiss.*

Filed July 19, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Plaintiff,

v.

RICHARD A. BALLINGER, Secretary of the Department of the Interior,
Defendant.

Now comes here the defendant, Richard A. Ballinger, Secretary of the Interior, and appearing specially for the purposes of this motion, and none other, and moves the court to dismiss the petition heretofore filed in the above-entitled cause for the following reasons:

I. Because the said petition or application is not verified by the affidavit of the applicant, as required by law.

II. For other defects apparent on the face of the petition.

OSCAR LAWLER,
Assistant Attorney General;
F. W. CLEMENTS,
Assistant Attorney,
Attorneys for the Defendant.

27 Messrs. Zevely, Givens & Smith, Attorneys for Plaintiff.

SIRS: Please take notice that the foregoing motion will be set down for hearing before Mr. Justice Wright, on Friday, the 23rd day of July, 1909, at 10 o'clock, a. m., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
Assistant Attorney General;
F. W. CLEMENTS,
Assistant Att'y,
Attorneys for Defendant.

Service of copy of foregoing motion and notice accepted this 19 day of July, 1909.

ZEVELY, GIVENS & SMITH,
Attorneys for Plaintiff.

Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

28 Frank Pierce, First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, while especially reserving to himself all benefit to any exception to the uncertainties and defects of the petition filed herein, and to the lack of jurisdiction in this court to grant a writ of mandamus compelling the performance by him of duties involving the exercise of judgment and discretion (such being the character of the act performance of which is sought by this proceeding), nevertheless to make answer to said petition, says:

1-5. He admits the allegations in the first five paragraphs of said petition.

6. He admits that a contest was instituted by relator in the office of the Commissioner to the Five Civilized Tribes, but he denies that any hearing thereon was had or testimony taken therein until long after May 10, 1909, or that any appeal, at that time or since, was taken, or that under the alleged rules of practice, the contest ever has been taken by appeal to the Commissioner of Indian Affairs, or the Secretary of the Interior. He denies that said, or any proceedings, either on May 1, 1909, or at any other time, or at all, culminated in a decision awarding said land to said relator, but on the contrary, alleges the fact to be that on May 10, 1909, said respondent announced that, in consideration of the facts then before him as such Acting Secretary of the Interior, he would, in due course of administration of the affairs of his office, in the absence of any facts which might thereafter develop to change said determination, award to said relator the right to select said lands under the provisions of the act of Congress of July 1, 1902.

29 He admits that, on said May 10, 1909, he considered a question then and there presented, viz., whether or not he should permit the said Eva Waters to accept from the relator a large sum of money in consideration whereof she was to be permitted to withdraw from said contest.

7. He denies that, as in form alleged in the seventh paragraph of said petition, he directed the chief of the Cherokee Nation to execute a deed to the land in controversy to said relator and to forward the same to him for approval and delivery, and avers that what he did in this behalf is shown by his telegram, sent May 11, 1909, to the Acting Commissioner to the Five Civilized Tribes, a correct copy of which is as follows:

Ryan, Acting Commissioner, Muskogee, Oklahoma:

Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of twenty-five thousand dollars for use of minor Waters. Contestant given including fifteenth to make payment. Upon receipt of thirteen thousand more within time allowed forward entire twenty-five thousand to Department endorsed to Secretary. When entire fund received by you prepare deeds to respective contestants and have them executed and forwarded here for approval. Report progress by wire.

FRANK PIERCE,
First Assistant Secretary.
F. P.

O. B. chg.
G. R.

30 8. He admits, as averred in the eighth paragraph of said petition, that the Principal Chief of the Cherokee Nation did sign and execute a deed of the land in controversy to the relator, and that the same was forwarded to the Department of the Interior; but he denies that he has ever approved said deed, and avers that without his approval said deed is insufficient to pass any title to the land in controversy either out of the Cherokee Nation as

such or of the reversionary interest of the United States in said land. He further denies that relator complied with all the requirements imposed on him by law, and avers that long prior to said May 10, 1909, relator had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation, by a deed, as will hereinafter be more fully set forth, and that in consequence thereof relator, on said May 10, 1909, and at the time of filing this petition for the writ of mandamus, had no interest in the land in controversy, and was not entitled to the allotment thereof. And he further avers that he was unaware of the circumstances of this transfer of relator's interest on and for a long time after said May 10, 1909.

9. As to the allegations contained in the ninth paragraph, he admits that he refuses to deliver said deed to the relator "properly recorded as provided by law," but denies that the execution of the deed by the Principal Chief of the Cherokee Nation conveyed the title to the land in controversy to the relator; denies that he approved said deed either in conformity to the provisions of the act of Congress of July 1, 1902, or in any manner at all approved the same; denies that as in form alleged he directed the Principal Chief to execute said deed; and denies that no discretionary power was left in him relative to said transaction, all of which will be more fully hereinafter shown and set forth.

10. He denies that relator is entitled to have said deed delivered to him.

11. He further denies that it is his duty to deliver said deed to the relator.

12. As to the allegation in the twelfth paragraph of said petition, he is advised that the same presents merely a conclusion of law, which he need not answer.

13. As to the allegations in the thirteenth paragraph of said petition, respondent states that the facts are as follows: Upon announcing his permission that the contestee, Eva Waters, might withdraw from the contest, he did state that, when relator had made full payment of the stipulated sum, he might then enter into possession, and that he, respondent, would direct issuance of patent or deed for the land in controversy; and he avers that he was moved to such action by reason of representations made to him by relator's counsel that the lands in controversy were being rapidly drained of their oil deposits by operations on contiguous tracts; but he denies that he authorized relator's alleged tenant to proceed with development for the purposes of prospecting for and producing oil and natural gas from said lands. And as to the averment that said tenant has gone upon said lands and has laid out and expended large sums of money thereon, respondent says that he is without information other than in said petition contained and cannot answer, on belief or otherwise, whether said statement is true or otherwise. But he does aver that under the rules of practice obtaining in the Department of the Interior, in Indian affairs, thirty days are allowed from and after notice of a decision within which time to

file a motion for review thereof, and that on May 21, 1909, in the presence of counsel representing the said Eva Waters and the said Herman Knight and Wm. J. Twist, he announced to said counsel that the said Eva Waters should have up to and including the 9th day of June, 1909, within which to file a motion for review of said order of May 10, 1909, and that counsel for said Eva Waters then and there gave notice that he would file and present such motion. If, in view of these premises, relator or any alleged tenant of his went on the land and did those things he alleges were done, he or they did so with knowledge that said order had not become final and at their peril.

14. He admits he has refused and still refuses to deliver said so-called deed to relator and as such Acting Secretary of the Interior he did order other and further proceedings relative to the subject matter hereof, as will more fully appear in his further answer; and this without any misconception of the force and effect to the so-called execution of said deed, which, as averred aforesaid, was not and never has been approved by your respondent. He denies that no other than a purely ministerial duty remained in him, after May 10, 1909, touching these premises, but, on the contrary, avers that his duties respecting the matters in controversy and said allotment of land are purely judicial, involving the exercise of official
33 judgment and discretion, and, as such, are not controllable by the courts in mandamus proceedings.

Furthermore, and more fully answering the rule herein issued, to show cause why the writ of mandamus should not issue as prayed, he avers:

That the merits of the contest, i. e., whether relator (the contestant) or Eva Waters (the contestee) had the greater right to allotment of the land in controversy, were not considered in making the disposition of the case on May 10, 1909, aforesaid; that it was then represented to him that the said Eva Waters, through her guardian, desired to withdraw from said contest in view of the large sum of money offered for such withdrawal; that relator's counsel represented that the consideration offered was amply commensurate with the extent of her potential interest in said land; and that moved by such considerations he deemed that said Eva Waters' interests would be subserved by allowing such withdrawal. But immediately thereafter, respondent avers that he was advised by telegram from the parent and guardian of said Eva Waters that the latter protested against allowance of said withdrawal, the same having been induced by gross misrepresentations of the value of the land in controversy; that thereafter a motion to review the action of May 10, 1909, was in due course presented by said Eva Waters, through her attorneys; that counsel for relator then and there appeared generally for the relator, and neither raised nor advanced
34 any objection as to your respondent's complete jurisdiction in the premises, or to his proceeding to entertain and give consideration to said motion for review; that by brief and argument said relator, by his counsel, appeared in opposition to the contentions, mainly as to the facts, made in behalf of said Eva Wa-

ters, and sought, not by plea or objection to the authority or jurisdiction of respondent, but upon the merits, to induce denial of the said motion to review and reconsider the action of May 10, 1909; that thereafter, and on June 24, 1909, the respondent being satisfied that the consideration offered for said withdrawal was inadequate, and that he had been misled in adjudging what the best interests of this Indian ward, said Eva Waters, required, he vacated said order of May 10, 1909, and thereafter directed that the contest case pending before the Commissioner to the Five Civilized Tribes should be proceeded with, considered, and disposed of on its merits, and thereafter directed that the money deposited on behalf of relator should be returned to the party depositing it. And he also avers that at no time did relator question his jurisdiction, but, on the contrary, submitted thereto. He avers that pursuant to his said order, the contest case wherein relator is contestant and said Eva Waters is contestee was duly proceeded with before said Commissioner to the Five Civilized Tribes and has not yet reached him for consideration in the due course prescribed by the rules of practice in such cases obtaining.

He avers that, under existing law, the Commissioner to the Five Civilized Tribes, under the direction of the Secretary of the Interior, is vested with exclusive jurisdiction to determine all matters
35 relative to the allotment of lands in the Cherokee Nation, and that his duties thereunder are strictly judicial, and are not subject to control by a court of law in mandamus proceedings.

He further avers that, under the law relating to the allotment of lands in the Cherokee Nation, the Commissioner to the Five Civilized Tribes is directed to issue allotment certificates as evidence of the right of an allottee to the land selected as his allotment as a step preliminary to the issuance of a deed or patent thereto, and that no such certificate of allotment has ever been issued to said relator.

He further alleges that the Cherokee Agreement (act of July 1, 1902 (32 Stat., 716)), provides (Sec. 59) that:

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in this patent.

He avers that under existing law no deed or patent is valid or sufficient to pass title until approved by him and recorded in the office of the Commissioner to the Five Civilized Tribes (Sec. 5, act of April 26, 1906), and that until title passes he has exclusive jurisdiction and control of all matters pertaining to such allotments; that his approval of such deed or patent is not a ministerial duty, but a duty requiring the exercise of judgment and discretion, involving a judicial determination of the rights of the appli-

36 cant for patent to the lands involved; and that pursuant to his duty and his right, he has refused to approve a deed of the lands herein in controversy to the said relator, because, while acting within his jurisdiction, he has determined that, under the law governing allotments in the Cherokee Nation, said relator has not yet shown himself, by a trial of the contest case instituted by him

against said Eva Waters, to be entitled to take said land in allotment.

And he further says that his action of May 10, 1909, in so far as it affects relator was in part induced by a concealment of material facts bearing upon relator's right, in any event, whether said Eva Waters did or did not withdraw from said contest, to take as his allotment the land in controversy. He avers that said relator, on or about April 15, 1909, for a consideration sold and disposed of all his alleged right, title, and interest in said land, to one C. C. Robert, who, he is informed and believes and therefore avers, is not a citizen of the Cherokee Nation or entitled to take an allotment of land therein. He is also informed and believes and therefore avers that said relator resides in Texas and that said contest for said allotment of land, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted, not for the benefit of the nominal relator, but for others who are not entitled to an allotment in the tribal lands of the Cherokee Nation; and he suggests to the court that the name of Herman Knight, the nominal relator or applicant for this writ of mandamus, is not subscribed to said petition; that it nowhere appears, save by verification of said

petition by one Thomas White, that the latter is, as asserted,
 37 the attorney in fact, duly authorized under a power of attorney from said Knight to sign said Knight's name to said petition or, in his behalf, to make this application for the writ of mandamus; and he further suggests that were such power of attorney forthcoming and in proper form produced, said verification of said petition by said Thomas White is not such verification required by the law in such case made and provided.

Wherefore, for the reasons and on account of the facts set forth in this return, it is respectfully submitted to the Court that this court is without jurisdiction in this proceeding for mandamus to consider the application of the relator or by mandate to control the discretionary action of your respondent.

And, having fully answered and made return to the rule to show cause, he prays that said rule be dismissed, with his reasonable costs and that he be discharged from further duty in answering thereunto.

OSCAR LAWLER,
Assistant Attorney General.
 F. W. CLEMENTS,
1st Ass't Att'y.

FRANK PIERCE,
Acting Sec'y of the Interior.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing
 38 answer by him subscribed, and knows the contents thereof; that the matters and things therein set out on his personal

knowledge, he knows to be true, and those set out on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 22nd day of July, 1909, before me,

EDWD. B. FOX,

Notary Public, D. C.

[SEAL.]

Service above acknowledged this day.

BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH.

Amended Petition.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia, — Term, 1909.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior,
Defendant.

To the Honorable Chief Justice and Associate Justices of said Court:

39 Your relator, Herman Knight, respectfully states as follows:

He is a citizen by blood of the Cherokee Nation and enrolled upon the approved roll of citizens by blood of said Nation as No. 16,760, age 26, as of September 1, 1902, and, as quantum of blood, $\frac{1}{4}$ Cherokee, as is more fully shown by a certificate from the Commissioner to the Five Civilized Tribes, which certificate is attached hereto, made a part hereof, and marked Exhibit "A".

As such citizen of the Cherokee Nation he is entitled to an allotment of land as provided by the Act of Congress approved July 1, 1902, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for disposition of townsites therein, and for other purposes."

On the 28th day of August, 1907, he made application to the Commissioner to the Five Civilized Tribes at the Cherokee Land Office to take in allotment the N./2 of the S. E./4 of the N. W./4, and the S. W./4 of the S. E./4 of the N. W./4 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation, now in the State of Oklahoma, and it appeared of record in the office of said Commissioner to the Five Civilized Tribes that on the 21st day of August, 1907, the said tract of land above described was selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters. The right of the class of citizens of the

Cherokee Nation to which Eva Waters belongs and the right of Eva Waters to select an allotment of the lands belonging to the Cherokee Nation, is now the subject of litigation in the United States Court of Claims at Washington, D. C., or in the Supreme Court of the United States, and is not yet adjudicated.

Under the rules of practice in Cherokee allotment contest cases before the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Department of the Interior, as approved by the Secretary of the Department of the Interior, it was incumbent upon your relator to proceed in the matter of the selection of his allotment as he did proceed as hereinafter set forth. A copy of said rules of practice is attached hereto, made a part hereof, and marked Exhibit "B."

When, on the 28th day of August, 1907, your relator appeared at the office of the Commissioner to the Five Civilized Tribes for the purpose of selecting the above described land as a portion of his allotment, he ascertained that the said described lands had been previously tentatively set aside for Eva Waters, and your relator then and there filed a contest against the said tentative selection.

Under the said rules of practice the said contest instituted in the office of the Commissioner to the Five Civilized Tribes was proceeded with, there, and on appeal before the Commissioner of Indian Affairs, and thereafter, on appeal from the Commissioner of Indian Affairs to the Secretary of the Interior. These various proceedings had touching the said contest culminated in a decision by the Secretary of the Department of the Interior on May 10, 1909, awarding the land above described to your relator, as may be seen by the decision rendered by said Secretary of the Department of the Interior on said day, a copy of which decision is hereto attached and marked Exhibit "C".

On May 11, 1909, the Secretary of the Department of the Interior directed the Chief of the Cherokee Nation, whose duty it was under the Act of Congress approved July, 1902, to execute deeds, to execute a deed to the above described land to Herman Knight and forward the same to said Secretary of the Department of the Interior for approval and delivery, as is more fully shown by a telegram in words and figures as follows, to-wit:

"29Ks HI C 89 Collect Govt.

Dn—WASHINGTON, D. C., *May 11th*, 1909.

Ryan, Acting Com'r, Muskogee, Oklahoma:

Lands in twist and knight cases against Waters will be awarded to Twist and Knight respectively upon payment of twenty five thousand dollars for use of Miner Waters contestants given including fifteenth to make payment upon receipt of thirteen thousand more within time allowed forward entire twenty five thousand to department endorsed to Secretary when entire fund received by you. Prepare deeds to respective contestants and have them executed and forwarded here for approval report promised by wire.

FRANK PIERCE,
First Ass't Sec'y.

Thereafter, and in response to the telegram above quoted the Commissioner to the Five Civilized Tribes advised the Secretary of the Department of the Interior of the due compliance by the relator with the terms of his said telegram and forwarded to the Sec-

42 retary of the Department of the Interior a deed properly executed by the Chief of the Cherokee Nation conveying to your relator the lands above described. Said deed has been approved by the Secretary of the Interior. The relator complied with all of the requirements imposed upon him by law. The land here involved is of more than \$10,000 in value.

Notwithstanding the due execution by the Principal Chief of the Cherokee Nation of the deed aforesaid conveying the title to the lands aforesaid to your relator, and notwithstanding the due approval by the Secretary of the Department of the Interior of said deed in conformity to the provisions of the Act of Congress of July 1, 1902; and, notwithstanding the fact that the Secretary of the Department of the Interior directed the Principal Chief of the Cherokee Nation to execute this particular deed; and, notwithstanding there is no discretionary power left in the Secretary of the Department of the Interior relative to said transaction, he refuses to deliver said deed to your relator properly recorded as provided by law.

Your relator is entitled to have the said deed delivered to him as aforesaid.

It is the duty of the Secretary of the Department of the Interior to so deliver said deed to this relator.

This relator has no other remedy than by mandamus.

After your relator had performed all of the acts necessary and prescribed by law and prescribed by the rules and regulations of the Interior Department touching the selecting of lands in allotment in the Cherokee Nation, and after the 11th day of May, 1909, the

43 Secretary of the Interior authorized and empowered your relator to have his tenant proceed with the development of said above described premises for the purpose of prospecting for and producing oil and natural gas from the said lands. In accordance with the said authority your relator has procured his said tenant to go upon said lands and said tenant is now upon said lands and has already laid out and expended large sums of money in prosecuting an effort to produce oil and natural gas from underneath the said premises.

Your relator further states as follows: The Secretary of the Department of the Interior has refused and still refuses to deliver the deed to your relator and has ordered other and further proceedings in the Department of the Interior relating to this subject matter, and has misconceived the force and effect of the execution and approval of said deed. While it clearly appears that there remains in the Department of the Interior, and that there is left to the Secretary of the Department of the Interior no other or further duty touching this subject matter, save and except the purely ministerial duty of delivering the said deed to your relator, the said Secretary of the Department of the Interior asserts the right to refuse to deliver

said deed to your relator upon the ground, as your relator is informed and believes from official notices received from the Secretary of the Department of the Interior, that he, the said Secretary, still has supervision and control over the lands conveyed by the said deed, and claims to have the right to yet allot said lands.

Wherefore your relator prays the granting of a writ of mandamus under the seal of this court directed to the said Secretary of the Department of the Interior, commanding him forthwith to deliver to your relator the said deed properly recorded as required by law in such cases, and to do and perform all such other acts and things in the premises as the law may require. And your relator asks all such other and further relief as may be right and just, and as in duty bound your relator will ever pray.

HERMAN KNIGHT.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH, *Att'ys for Compl.*

STATE OF INDIANA,
Marion Co., ss:

Herman Knight, of lawful age, being first duly sworn according to law on his oath states; that he is the relator in the above petition for a writ of mandamus and that he knows the contents of said petition; and he states that the matters and things therein alleged are true in substance and in fact, save such things as are alleged upon information and belief he believes them to be true; and that he has signed the same as his free act and deed.

HERMAN KNIGHT.

Subscribed and sworn to before me this 21 day of July, 1909.

[SEAL.]

LEW CAMPBELL,
Notary Public.

My commission expires March 11, 1917.

(Endorsed:) File. W.

45

Stipulation as to Answer.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

HERMAN KNIGHT, Pl'ffs,

vs.

BALLINGER, Sec'y Int., Def't.

It is hereby stipulated & agreed that the Answer as filed by the Def't herein may stand as an Answer to the Amended Complaint.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH, *For Pl'ff.*
OSCAR LAWLER, *For Respondent.*

Stipulation as to Exhibits.

Filed July 23, 1909.

In the Supreme Court of the District of Columbia.

No. 51808. At Law.

U. S. ex Rel. KNIGHT, Petitioner,

vs.

RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

46 It is hereby stipulated and agreed that the Exhibits filed herein with the original petition and made a part thereof, shall be deemed and considered to be a part of the Amended Petition filed herein this 23d day of July, 1909.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH, *Att'ys for Pl'ff.*
OSCAR LAWLER,

*Assistant Attorney General,
Att'y for Respondent.*

Replication.

Filed July 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

For reply to the answer of respondent herein, relator states as follows:

Replying to paragraph six of said answer, relator states the fact to be that the Secretary of the Interior did, on May 10, 1909, award the land in controversy to Herman Knight and did, on May 10, 1909, permit and authorize Eva Waters to accept, and he, the said Secretary of the Interior, did accept from the relator a large sum of money in consideration whereof she was permitted to withdraw from said contest. Relator further avers that on subsequent dates to May 10, 1909, the Secretary of the Interior did confirm
47 and approve the said decision of May 10, 1909.

Replying to paragraph seven of said answer, relator states the fact to be that the telegram as quoted in the answer of respondent erroneously uses the word "progress" in the last line of said tele-

gram before the signature; and said telegram should read: "promptly," instead of "progress."

Replying to that part of paragraph eight of said answer which avers that the relator herein, long prior to May 10, 1909, had disposed of all his alleged interest in the land in controversy to a non-citizen of the Cherokee Nation by a deed, relator denies that he had on said May 10, 1909, or at any time prior thereto, parted with his right to claim the same in allotment and states the fact to be that he now has, as he has always had, the right as a citizen of the Cherokee Nation, to claim said land as an allotment.

Further replying to said paragraph eight, relator states that he has not sufficient information to state as to whether or not respondent was, as he avers, unaware on May 10, 1909, of the alleged transfer by the relator of his interest in said lands.

Replying to paragraph nine of respondent's answer relator states that said paragraph nine is merely a conclusion of law.

Replying to paragraph thirteen of respondent's answer, relator states the fact to be that, at the time of the decision rendered by said Secretary of the Interior, relator was in lawful possession of the lands in controversy; that the Secretary of the Interior having fixed

48 the price at which the minor Eva Waters would be permitted to withdraw and the lands patented to Herman Knight, authorized Herman Knight to proceed through his tenants with the prosecution of developments for oil and natural gas without waiting for the physical delivery to the said relator of a deed or patent to the land,—the only condition which he had to observe to authorize him to proceed with this development being the payment in full of the sum demanded by the Secretary of the Interior, to-wit: the sum of fifteen thousand dollars; that your relator paid said sum to the Secretary of the Interior for the benefit of said minor Eva Waters, and on May 13, 1909 your relator complied with said condition and immediately erected on said land derricks and other machinery necessary to the drilling for oil and natural gas, and said derricks and machinery were on said land and the work was being prosecuted prior to and on May 24, 1909.

Replying to paragraph fourteen of respondent's answer, relator states the fact to be that the Secretary of the Interior, to-wit: Frank Pierce, acting as Secretary of the Interior, as by law he was authorized to do, after due investigation, demanded of relator to pay into his hands for the benefit of Eva Waters a minor the sum of fifteen thousand dollars; that upon the payment of said sum he directed the Principal Chief of the Cherokee Nation to issue to said relator a patent or deed to the lands in controversy. Herman Knight complied with the condition and the Principal Chief executed the deed. Relator states that no discretionary act remains to the Secretary of the Interior and only the purely ministerial one of delivering the deed or patent to the relator.

49 Further answering paragraph fourteen of respondent's answer, relator admits that the question as to whether or not relator or Eva Waters the minor contestee had the greater right to

the allotment of the lands in controversy was not decided on its merits and avers the fact to be that the disposition of the case made by the Secretary of the Interior on May 10, 1909 was in consequence of an investigation made by the Secretary of the Interior himself by means of which he arrived at a determination as to the value of the premises involved. Relator further avers the fact to be that the respondent was not moved to the action taken by him in this regard upon any representation made by counsel for relator but was moved solely and entirely to the action taken by him by investigations conducted upon his own account. Relator states the fact to be that he offered to pay for the benefit of said Eva Waters a minor the sum of seventy-two hundred dollars to procure her to withdraw her application to allot said lands and to permit your relator to allot them and that counsel for relator represented to the Secretary of the Interior, fully believing said representations to be true, that said sum of seventy-two hundred dollars was entirely adequate to warrant him in permitting the said Eva Waters to withdraw her application to allot said land; that the said Secretary of the Interior, not content with these representations, not satisfied with the sum tendered,—for himself investigated the proposition and after a full hearing, both by brief and oral argument, by testimony of experts offered by your relator, by the statements of government officials who examined the property, by reason of the Secretary's own

50 investigation of the physical fact—having himself been on the premises in controversy—he decided that the sum offered was inadequate and demanded of your relator that he pay him the sum of fifteen thousand dollars in consideration of which he would permit the said Eva Waters to withdraw her filing and would issue to your relator a deed or patent to said land, and urged your relator to pay the same.

Further replying to paragraph fourteen, relator denies that any misrepresentations of any character were made to the parent and guardian of Eva Waters as to the value of the land in controversy.

Further replying to said paragraph fourteen, relator denies that the action sought to be taken by the Secretary of the Interior on June 24, 1909, looking to vacating the order of May 10, 1909 was taken in consequence of his having been misled by your relator or his counsel; but on the contrary avers the fact to be that the price which your relator paid for the benefit of said Eva Waters was made in consequence of the investigation made by the Secretary of the Interior himself; and further avers the fact to be that the consideration paid was entirely adequate and for the best interests of the minor, said Eva Waters.

Further replying to said paragraph fourteen, your relator states the fact to be that the money deposited on behalf of relator has not been returned to him; and as to whether or not the respondent directed the same to be returned to him, your relator is not sufficiently informed either to affirm or deny.

51 Further replying to said paragraph fourteen of respondent's answer, relator denies that he has not questioned the jurisdiction of respondent to proceed further with said investigation,

and avers the fact to be that by telegram of date July 12, 1909, he advised the respondent of his purpose to file this suit in mandamus in this court on July 16, 1909. He further avers the fact to be that when said contest case of Herman Knight against Eva Waters was called for trial at Muskogee on the 16th day of July, 1909, that then and there by his counsel he protested against any further steps being taken touching said land, stating as the grounds of said protest that the land had already been patented to your relator and that the jurisdiction of the Department of the Interior touching said land had ceased.

Further replying to said paragraph fourteen of respondent's answer, relator states that while under the law certificates of allotment may be issued to applicants for allotment of lands in the Cherokee Nation, he avers it to be the fact that the issuance of a certificate of allotment is not an essential and prerequisite step to the issuance of a patent.

Further replying to paragraph fourteen of respondent's answer, relator states that under the law governing allotments in the Cherokee Nation it is not necessary that a contest case once instituted should be tried to a final conclusion to entitle the applicant to have the lands in allotment, but that various forms of procedure obtain before the Commissioner of the Five Civilized Tribes and the Secretary of the Interior by means of which allotments may be
52 selected and patents thereto issued; that your relator has, by the action of the Secretary of the Interior directing the Principal Chief to issue patent to him, become entitled and is entitled to have the same delivered.

Further answering said paragraph fourteen of respondent's answer, relator denies that the action of respondent taken May 10, 1909 was in any manner or in part induced by the concealment of any material facts bearing upon relator's right; he denies that on or about April 15, 1909, or at any time, for a consideration he sold and disposed of all his "alleged" right, title and interest in said land to one C. C. Robert or to any other person. Under the law he could not dispose of said land; and if any purported conveyance was made on April 15, 1909, it was not intended to be a conveyance in fee, but was merely intended to be and sought to be a mortgage; that since said date the said Robert has re-conveyed to relator all interest or purported interest which your relator sought by said conveyance of April 15, 1909 to convey to him.

Further answering said paragraph fourteen of respondent's answer, your relator states that it is immaterial where his citizenship may now be as affecting his right to take lands of the Cherokee Nation in allotment, and denies that he is a citizen of the State of Texas, and avers the fact to be that he is a citizen of the State of Oklahoma. He avers that his contest seeking to allot the land in controversy, as well as these proceedings for a writ of mandamus, have been and are maintained and prosecuted for his own
benefit

53 Relator further avers that the law requiring the Secretary of the Interior to approve patents in order to divest the Uni-

ted States Government of its reversionary interest does not prescribe the manner in which the formal approval shall be executed by the Secretary of the Interior.

Having fully replied to the answer of respondent herein, your relator respectfully prays that a peremptory writ of mandamus be issued against the said respondent requiring him to deliver to your relator a deed to said land, properly recorded, and for such other and further relief as to the Court may seem just, and for his reasonable costs.

BRANDENBURG & BRANDENBURG &
ZEVELY, GIVENS & SMITH,
Att'ys for Relator.

Joinder of Issue.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

The respondent joins issue upon the replication of the relator, Herman Knight, to respondent's answer to the rule to show cause.

OSCAR LAWLER,
Ass't Att'y Gen'l,
F. W. CLEMENTS,
Attorneys for Respondent.

54 Service acknowledged July 30, 1909.
BRANDENBURG & BRANDENBURG,
Att'ys for Relator.

Notice of Hearing.

Filed July 30, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

To Brandenburg & Brandenburg, E. R. Perry, and Zevely, Givens & Smith, Attorneys for Relator:

Please take notice that on August 3, 1909, at 10 o'clock in the

morning, we shall ask the court that the issues joined in the above-entitled cause may be set for trial at an early date.

OSCAR LAWLER,
Ass't Att'y Gen'l,
 F. W. CLEMENTS,
Attorneys for Respondent.

Service accepted July 30, 1909.

BRANDENBURG & BRANDENBURG,
Att'ys for Pet.

55 Supreme Court of the District of Columbia.

TUESDAY, August 3d, 1909.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * *

No. 51808. At Law.

U. S. ex Rel. HERMAN KNIGHT, Petitioner,
 vs.

R. A. BALLINGER, Sec'y, Respondent.

On motion of attorney for respondent, and for good cause shown, this cause is hereby set for hearing on the 2nd day of September, 1909.

Supplemental Answer.

Filed September 1, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
 v.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

56 Comes now Frank Pierce as First Assistant Secretary of the Interior, and, in pursuance of law, acting as Secretary thereof in the absence of Richard A. Ballinger, Secretary of the Interior, and here reiterating, reaffirming and reasserting all, each and every of the matters and things set forth in his answer heretofore filed in the above entitled matter by way of supplemental answer, said petition alleges:

That heretofore and on the 19th day of July, 1909, the matter of the contest then pending before the Commissioner to the Five Civilized Tribes to determine the right as between the relator above

named and said Eva Waters to the land described in the petition herein came on regularly to be heard, the said relator having theretofore regularly appeared and been represented by counsel in said contest, and thereupon, and after the hearing of proofs and evidence in reference to the respective matters and issues raised in said contest, the Commissioner to the Five Civilized Tribes did duly and regularly, and in all respects in manner and form in accordance with law, decide said contest and the issues therein against the said relator and in favor of the said Eva Waters, and awarded said lands involved in said contest and described in said petition to the latter, and denied any right in the said relator thereto.

That under and in accordance with the rules and regulations of the said Department of the Interior, and pursuant to the regular practice in that behalf, said relator was allowed thirty days within which to appeal from the said decision of said Commissioner to the

57 Five Civilized Tribes, but that said relator failed and refused to take any such appeal, or any proceedings to have reviewed the decision of the said Commissioner to the Five Civilized Tribes aforesaid, and said decision thereby, and upon the 18th day of August, 1909, became final and conclusive.

That thereafter, and on the 27th day of August, 1909, and in the ordinary course of its duty in the premises, said Department of the Interior, through the office of the Commissioner of Indian Affairs, delivered to the lawful guardian of the said Eva Waters, deed, duly executed by the persons and in the manner required by law, and duly approved by the said Secretary of the Interior, conveying unto the said Eva Waters full and complete title in and to the real property described in the petition in the above entitled matter, and that said Eva Waters, minor as aforesaid, is now, and ever since the approval and delivery of said deed has been, the absolute and unqualified owner of said real property.

That by reason and on account of the execution and delivery of said deed as hereinabove set forth, the said Department of the Interior has not nor has any officer thereof, any power, authority, or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein or to any other person.

58 Wherefore, respondent prays that he be hence dismissed and for his costs.

FRANK PIERCE,
Acting Secretary of the Interior.

OSCAR LAWLER,
Assistant Attorney General,
Attorney for Respondent.

F. W. CLEMENTS,
1st Ass't Att'y.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing supplemental answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this first day of September, 1909, before me,

[SEAL.]

W. BERTRAND ACKER,
*Notary Public in and for
 the District of Columbia.*

59

Depositions.

Filed September 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
 KNIGHT, Plaintiff,
 vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior,
 Defendant.

At Law. No. 51809.

WILLIAM J. TWIST, Plaintiff,
 vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior,
 Defendant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Be it known, that — an examination of witnesses begun and held on the 24th and 25th days of August, A. D. 1909, when the depositions hereto attached were taken, I, Guy L. Reed, a Notary Public in and for the state and county aforesaid, did cause to be personally present before me at the office of R. W. Kellough, at Tulsa, Oklahoma, the following named witnesses, viz: D. F. Connolly, J. Robert Burnham, T. A. Cates, William S. Mowris, Henry Steinberger, John Roy, E. R. Perry, W. A. Martin, and P. J. White, to testify on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia, wherein the United States of America, on the relation of Herman Knight and William J. Twist, respectively, is re-

lator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties that the testimony here taken shall apply to both causes Nos. 51808 and 51809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public; and that witnesses subpoenaed for the 25th of August may be examined on the 24th.

Present on behalf of the relator, Messrs. Zevely, Givens & Smith and Mr. E. R. Perry; and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon the said witnesses deposed and said as follows:

D. F. CONNOLLY, being first duly sworn, deposes and says:

Direct examination.

By Mr. ZEVELY:

Q. State your name and age and occupation, please, and residence.

A. David F. Connolly; age 50; occupation, oil producer.

61 Q. Residence? A. Tulsa, Oklahoma.

Q. How long have you been engaged in the oil business, Mr. Connolly? A. Over thirty years.

Q. Have you been engaged exclusively in that business? A. Yes sir.

Q. In what branches of it? A. The producing business.

Q. The producing business? A. Yes sir.

Q. Buying, leasing and developing? A. Leasing land, and buying and leasing and drilling wells, and having general charge of the developing business, more or less, all the time.

Q. This is a controversy, Mr. Connolly, wherein Herman Knight and William J. Twist, citizens of the Cherokee Nation by blood, seeking to mandamus the Secretary of the Interior requiring him to deliver to them patents to certain lands, those lands described as follows: The lands of Herman Knight are the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North, Range 13 East in the Cherokee Nation, and the lands sought to be patented—to have the patent delivered to Twist, are described as the East 20 acres of Lot 2 of Section 19, Township 20 North, Range 13 East, in the Cherokee Nation. Are you familiar with the lands described? A. I am.

Mr. ZEVELY: Mr. Notary, for the convenience of all parties, I will offer in evidence a plat showing the lands in controversy and lands immediately about the lands in controversy. Also, showing
62 the wells that have been drilled in the immediate vicinity of the property involved in this suit. The white dots indicating producing wells. Let that plat be marked Exhibit A. (Plat marked)

Mr. Cook: Respondent objects to the introduction of said map for it is not shown that it was made by competent surveyor, nor

does it show the date which said map was made, which would show the time that the wells supposed to be located around the land in controversy, were in operation.

Mr. ZEVELY: Plaintiff desires to say that we will hereafter, by competent testimony, show the authenticity of the map and the date of its making.

Q. Mr. Connolly, have you been upon the land which I have just described to you, recently? A. Yes sir.

Q. You understand the situation with reference to the oil development in the immediate vicinity of the fifty acres involved in this controversy? A. There has been some—probably three months since I was on the property. I was familiar at that time by actual observation. Since which time, I have only learned of the development by consulting maps.

Q. Mr. Connolly, I will ask you to direct your attention to the thirty acres first described, being the thirty acres sought to be taken by Herman Knight in allotment, and ask you what, in your judgment as an oil man, is the value of that thirty acres in fee, — from the encumbrance of any lease or mortgage, or incumbrance of any sort whatever?

63 Mr. Cook: On behalf of the respondent I object to the testimony as to the value of this land for oil production, for the reason that it has no bearing on the question involved in this mandamus proceeding.

Q. Answer the question, Mr. Connolly. A. I believe the land would bring at the present time, possibly three hundred dollars per acre.

Q. That would be nine thousand dollars for the thirty? A. Yes sir.

Q. And six thousand dollars for the twenty? A. Yes sir.

Q. Mr. Connolly, on or about April 8th, 1909, what is your opinion as an oil man of the value of a lease on this fifty acres described above, considering that you were to pay a royalty of twelve and a half per cent? A. On the two pieces, the fifty acres?

Q. Yes sir; or you may answer separately as to the thirty and twenty. A. It would possibly command a bonus of seven or eight thousand dollars.

Mr. Cook: Is that answer as to April 8th?

Mr. ZEVELY: April 8th.

Q. That is the whole fifty? A. Yes sir.

64 Cross-examination.

By Mr. Cook:

Q. You say you have not been upon this land for the last three months, Mr. Connolly? A. I was out on the land at the time Mr. Pierce was here, on one corner of one piece, I think. I think it was in April.

Q. You haven't been there since that time? A. No sir.

Q. Are your estimates as to the value of this land at the present time, based upon production that has been made on that land since you testified here in this proceeding April 8th, 1909? A. I understand there is no production on the land.

Q. Upon what did you base your opinion that the lease on these lands at the present time is worth fifteen thousand dollars? A. Because I believe people would pay that for it, if put up for sale.

Mr. ZEVELY: I will ask you to read that question again. I think the question stated fifteen thousand for the lease.

Mr. COOK: I understood him to testify——

Mr. ZEVELY: He testified he would pay fifteen thousand dollars for the fee.

Q. In your opinion, is this land worth more at the present time than it was in April? A. It is not worth as much at the present time as it was in April.

65 Q. Why not? A. There has been a great deal of oil taken out of the surrounding property since that time.

Q. Then, on that hypothesis, what would this land have been worth or the fee in this land, on April 8th, 1909?

Mr. ZEVELY: I object to that question as being incompetent, immaterial, and irrelevant.

Q. Answer the question, sir. A. Put the question, please.

Q. Read the question (question read). A. Do you have reference now to the land in fee?

Q. Yes sir. A. Outright?

Q. Yes sir. A. The land might have brought in April, fifteen or twenty thousand dollars, had it been——

Q. How much? A. Fifteen or twenty thousand dollars.

Q. You testified that it was worth fifteen thousand now, did you not? A. Yes sir. I didn't testify—I said it would bring that if it were sold, I think, at public sale.

Q. Would this—this land would only be valuable for oil purposes, would it not, Mr. Connolly? A. It would have some agricultural value.

Q. What do you think that land would be worth for agricultural purposes? A. Possibly be worth twenty-five dollars an acre or thirty dollars an acre.

66 Q. How much of it is subject to cultivation? A. I cannot say. When I looked at the land, I was not estimating its agricultural value, and didn't consider that part of it.

Q. There is a big gulley or creek running through it, is there not? A. Yes, but it doesn't cover all—I think that in itself would indicate it was more valuable—than upland.

Q. Did you mean to testify when you say it is worth fifteen thousand dollars for the fee, that that would be a fair valuation of Eva Waters' — in this land? A. At the present time?

Q. Yes. A. That is more than I would pay for it individually.

Q. You testified that would be worth—— A. I said would bring that if sold.

Q. You think it worth less than when you testified in April? A. Very much less.

Q. April 8th, 1909, you testified in this proceeding that you thought ten thousand dollars would be a good price for Eva Waters' interest, and that twelve thousand dollars for it seemed a very good offer, did you not? A. I think so still, and it was more than I would have paid for it at that time as an individual; but that don't say that is what the land would probably *brought* if put up for the highest bidder.

Q. Are you an individual oil producer? Or are you associated—— A. I am associated with a company; officer and
67 stockholder.

Q. Have you any interest in companies having interests contiguous to this fifty acres? A. No sir; our nearest production is probably six miles; have one small well probably six miles away.

Q. You have no direct or indirect interest in any companies or leases around this property? A. We have some unanalyzed stuff about four miles from this property, but I have no interest whatever either directly or indirectly in the oil with anybody connected with this suit, to my knowledge.

Q. Have you any interest or hold any *stuff* in the following companies: The Highland Company; the Los Angeles Cherokee Oil Co.; Little Rock Oil Company; the Alpine Oil Co., or the Justin Oil Company? A. No sir; I have no interest whatever in any of those companies.

Q. Where have you been since you testified here last, in April, Mr. Connolly? A. I have been nearly altogether in Oklahoma; I have been east one trip; far east as New York City.

Q. When were you east? A. In June.

Q. How long were you there? A. I was about four or five days; I was ten days out of Oklahoma.

Q. What time was that in June? A. I can't give you the exact dates from memory.

Q. Well, just approximately. A. Well, it was before the middle of the month, as I remember it.

68 Q. You have been here in Tulsa and vicinity all the other time, since April? A. Yes, sir, except when I took a trip through the field or over to Muskogee, outside of town.

Q. Have you done any work for any of the companies I mentioned heretofore? A. No, sir.

Q. Not employed in any capacity with them? A. No, sir.

Q. You are an expert oil man, are you Mr. Connolly? A. Well, I have been working at the business all of my life, or since I was able to work; about thirty-two years; filled every position from roustabout to manager of——

Q. What is the effect of the draining of sixteen or more wells immediately surrounding land of this character?

Mr. ZEVELY: We object to that as incompetent, irrelevant, and immaterial.

Q. Answer the question. A. They would take a great deal of

oil from under this land, if they have been down for sometime, they certainly would be drawing from under this land.

Q. Do you know how many wells there are immediately surrounding this land? A. I counted those wells, when I was out there last April, but I cannot recollect now, but consulting a map, I note there is about seventeen around the border here.

Q. They range from a distance of twenty-five to one hundred and fifty feet from the line, do they not? A. I understand some of them are very close to the line; so close, that—well, right on
69 the line; others are back two hundred feet.

Q. Do you know about what the daily production of these wells are? A. No, sir, I cannot tell you.

Q. They average about two hundred barrels per well? A. I don't know.

Q. Do you know whether or not other wells have been drilled in there since April? A. Yes, sir, I have been driving out that road within sight of that property, and I have noticed drilling wells, and I understand from the monthly reports that I scan very closely that there has been wells drilled up there; and the general report that the wells were very good to the north of this property on the adjoining property; heard them so reported as being very good wells.

Q. Do you know whether or not there are any wells in operation on this particular fifty acres? A. I don't know whether there are any wells in operation on it.

Q. Had you any reason for having more than a casual interest in noticing these wells, Mr. Connolly? A. Now, just put that question—I don't understand what—

Q. Read the question (question read). A. I went on the property purposely to look it over in April, for the purpose of estimating the—looking at the development that had been made, and, going out later with Mr. Pierce—he went out there to see a well flow on the adjoining property, close to the line and this property; that was the only time I ever went near the property and noticed the development that was made, although I have heard the property
70 discussed. Read about the litigation and heard people discuss the conditions there, and from that way became somewhat familiar from hearsay.

Q. That the only reason you took particular notice of it? A. I was asked to see what development was made there.

Q. By whom? A. By Mr. White.

Q. Do you know for what purpose Mr. White asked you to notice the development on this land? A. He wanted to get my opinion as to the value of the property, I think.

Q. When was that? A. Last April.

Q. Before you testified here in the former hearing? A. Yes, sir.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Connolly, you went out to this lease—to this property in controversy, with Assistant Secretary Pierce, did you? A. Yes, sir.

Now that—I don't think we were on this property, but very close to the edge of the adjoining property.

Q. How near were you to it? A. Must have been a couple hundred feet.

Q. How long were you out there? A. Probably five minutes; we were pressed for time to make a train, and merely got on top
71 of a tank and saw it flow, about a minute; got off the tank and got in an automobile, and flew for the train. While there Mr. Pierce made some inquiry about the surrounding, or spoke something about the surrounding property.

Q. Made inquiry about the wells around there? A. Yes sir.

Q. What they were producing, etc.? A. I think something was spoke about the production, as well as I remember.

Cross-examination.

By Mr. Cook:

Q. You were there with Mr. Pierce about a minute? A. On the top of one of the tanks.

Q. Where was that tank located? A. I think on the adjoining property. We got in off of this road, and went into a well about this well here.

Q. As a matter of fact, you couldn't see all of that land from the place, could you? A. From the top of that tank you could see about all of it. And as you approach from the road, you can see over the land.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Connolly, you have testified in response to a question here, that you went out there at the instance of Mr. White. I will ask you whether or not you didn't go with Mr. White and if
72 he didn't tell you what wells were producing there so that you could fix an estimate of the value of the property? A. Yes, sir.

Q. That is how you reached that conclusion? A. Yes sir.

Recross-examination.

By Mr. Cook:

Q. What White was that you went out there with? A. P. J. White.

Q. He is the lessee in this Knight property? A. Yes sir.

DAVID F. CONNOLLY.

J. ROBERT BURNHAM, being first duly sworn, upon his oath, deposes and says:

Direct examination.

By Mr. ZEVELY:

I will state, first, I offer Mr. Burnham's testimony for the sole purpose of establishing the fact that he is the man who made the

map of the lands involved, which has been offered as an exhibit, and I want to show by him the time of making it, and his competency to make the map. His name is not in any of your lists, and no notice of our taking his testimony.

73 Mr. Cook: I object on behalf of respondent, for the reason that no notice has been given that this party's testimony would be taken, and no stipulation entered to the effect that it would be taken.

Q. What is your occupation, Mr. Burnham? A. Civil engineer and surveyor.

Q. What is your age? A. Thirty-eight.

Q. How long have you been engaged in the business? A. Since from twelve to fourteen years old.

Q. That would be about twenty-four years. Mr. Burnham, I have offered here in evidence a map marked—entitled a complete map of north Tulsa Oil Field, which is here shown to you. Did you make that map? A. Yes sir.

Q. Is that an accurate map of the lands it purports to represent as having been surveyed by you and platted? A. Yes sir.

Q. Does this map show accurately the oil wells which are drilled upon the lands covered by this map? A. Yes sir, practically so.

Q. How were they indicated? A. Indicated by white dots on here, and one place up here with a circle; that should have been whited in.

Q. Surveying is your business? A. Yes sir.

Q. You follow that as an occupation? A. Yes sir.

Mr. Cook: Stand aside.

J. BOBB BURNHAM.

74 T. A. CATES, being first duly sworn, upon his oath, testified as follows:

Direct examination.

By Mr. ZEVELY:

Q. What is your name? A. T. A. Cates.

Q. What is your age? A. Forty-four.

Q. Where do you live? A. Lenapah, Oklahoma.

Q. What is your occupation? A. Farmer, principally.

Q. Are you a member of the Cherokee Tribe of Indians? A. No sir.

Q. Are you an intermarried citizen? A. Yes sir.

Q. Do you know Charles Waters? A. Yes sir.

Q. Where does he live? A. He lives at Westville, Oklahoma.

Q. State whether or not, if you know, he has a minor child named Eva Waters? A. He has.

Q. Did Mr. Waters ever consult you or converse with you relative to the value for oil purposes of a certain fifty acres of land upon which contests had been instituted by Hermann Knight upon thirty acres and William J. Twist upon twenty acres of it, described, the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the

N. W. 4 of Sec. 19, Township 20 North, Range 13 East, in the Cherokee Nation, Indian Territory? A. Yes sir.

Mr. Cook: To which respondent objects as irrelevant, incompetent, and immaterial, and as having no bearing upon the issues in this proceeding.

75 Q. Answer the question, Mr. Cates. A. He did.

Q. Did you give him an opinion as to the value of his child's interest in that land, considering that there was a lease upon it which carried one-eighth royalty, having in mind the proposition that if he were to relinquish that filing altogether and receive a sum of money in lieu of it, what sum he ought to receive for the benefit of the minor for this fifty acres?

Mr. Cook: Respondent objects for the reason that the question is irrelevant, incompetent, and immaterial, and further ask- that the question be stricken from the record for the reason that it is leading and places the answer in the witness' mouth.

A. Yes sir.

Q. What value did you place on it?

Mr. Cook: Objected to for the same reason.

Q. Answer the question. A. Well, I told him that he could afford, I thought, to relinquish for twelve thousand dollars for the child.

Q. The entire fifty acres? A. Yes sir.

Q. Did he come to you voluntarily? A. Yes sir.

Q. Did you ever make any suggestion to him with reference to compromising his child's interest in this land prior to the time he came to you in regard to it? A. No sir.

Mr. Cook: Objected to as incompetent, irrelevant, and immaterial.

76 Q. Did you have any subsequent conversations with Mr. Waters about this? A. No, sir.

Cross-examination.

Mr. Cook:

Q. Where did you say you live, Mr. Cates? A. Lenapah, Oklahoma.

Q. Where have you been since last April? A. Principal part of my time I have been at home.

Q. Haven't been out of Oklahoma since that time, have you? A. Yes, sir, I have been at Coffeyville, Kansas.

Q. Just over the line? A. Just over the line.

Q. For a day or two? A. Oh, no, go up and come back the same day.

Q. Mr. Cates you testified you are a farmer? A. Yes, sir, have been.

Q. You are not an expert oil man? You are not an oil man? A. No, sir.

Q. Lenapah is up above Nowata, isn't it? A. Yes, sir, 12 miles.

Q. How far is that from Tulsa? —. About forty miles, I expect; thirty-six or forty.

Q. How much? A. Thirty-six or forty.

Q. How far is it by railroad? A. I think it is thirty-six, if I am not mistaken; wait a minute; I am wrong on that.

77 Q. More than that from Claremore to Lenapah. A. I counted from Lenapah to Nowata.

Q. Something like a hundred miles isn't it? Approximately a hundred miles? A. It is not that far, I don't think; seventy-five, I think.

Q. Seventy-five miles? A. Yes.

Q. On what did you base the opinion given to Mr. Waters that he should take 12 thousand dollars for the interest of Eva Waters in this fifty acres of land? A. On the production surrounding this land.

Q. Are you familiar with this land? A. I have been on the land.

Q. How many times? A. Only once; one time.

Q. Are you familiar with the lands surrounding this fifty acres?

A. I am not familiar with them; I saw them once only.

Q. Do you know any—the oil companies or any of the individuals who are producing oil from contiguous lands to this fifty acres? A. I understand Mr. White is—I don't know.

Q. You don't know of your own knowledge? A. No, sir.

Q. Matter of fact, you don't know what the production of the lands around this fifty acres is, do you? A. Except from what I saw of the wells and what other parties have told me.

Q. How long were you there at the time you went on this piece of land? A. About two hours and a half, I guess, or three hours.

Q. What did you go there for? A. Well, I went there in behalf of Mr. Waters. He asked me to go there and look at this
78 land, and see what I thought would be a fair price for him to relinquish it.

Q. Can you by looking at an oil well tell what its production is? A. When I see it flow, I can give a pretty good——

Q. Were these wells flowing? A. They were pumping, and I think one or two flowing.

Q. What wells did you see about these lands? A. Wells on the south and on the east.

Q. When did you go there? A. I don't remember. About the 5th I think it was.

Q. Of what? A. April.

Q. How many wells did you find south of this land? A. I don't remember; there were fourteen, I think it was, surrounding this fifty acres.

Q. You testified that you saw the production from the wells on the south and on the east, did you not? A. Yes sir.

Q. What were the production of the wells on the south? A. Well, they ran somewhere between fifty and a hundred and fifty, so I was told.

Q. Well, are you testifying from what you were told or from

your own personal knowledge? A. Well, I saw several of these wells flowing, that is, the oil flowing from them, pumping, and they didn't seem to be heavy wells at all; that is what I based my opinion on.

Q. Purely guess-work on your part, as a farmer, making a guess as to the production of the oil well?

Mr. ZEVELY: We object to that; purely argumentative.

79 Q. Answer the question. A. Possibly part of it was guess-work.

Q. How many wells did you find on the south? A. I don't remember now.

Q. And they, in your opinion, were flowing from fifty to one hundred and fifty barrels per well? A. Those on the south were lighter wells than those on the east.

Q. Lighter wells? A. Yes, seemed to be.

Q. You never had any control of oil production, did you, ever drilled any land from which you obtained oil? A. My wife and children had three allotments about three hundred and sixty acres, part of it developed.

Q. You never developed any of it yourself, did you? A. No sir.

Q. Have you been on that land since the first time, Mr. Gates? A. No sir.

Q. You don't know anything about its value now, then? A. No sir.

Q. Now, who was it you talked with about the production of this land when you went out there about the 5th of April last? A. Well, I talked with Mr. White, and to——

Mr. ZEVELY: With Mr. White—P. J. White.

A. Mr. P. J. White, and with the parties who were taking care of the lease out there.

Q. Did you know who those parties were taking care of that lease for? A. I don't.

80 Q. Is Mr. White one of the gentlemen who has a lease on a portion of this land, or is contending in this proceeding? A. I don't know about that.

Q. Who defrayed your expenses from Nowata over here and back when you came to look at this land? A. I did.

Q. Were you ever reimbursed by anybody? A. Yes sir.

Q. Who? A. Mr. White.

T. A. CATES.

W. S. MOWRIS, first being duly sworn, upon his oath deposes and says:

Direct examination.

By Mr. ZEVELY:

Q. State your name and age and residence and occupation, if you please. A. William S. Mowris; 42 years; Tulsa; oil operator.

Q. Occupation? A. Oil Operator.

Q. What did you say your occupation is, Mr. Mowris? A. Engaged in the oil business.

Q. How long have you been engaged in the oil business? A. Since about 1886.

Q. In what states? A. In Pennsylvania, West Virginia, Kentucky, Ohio, Indiana, Illinois, Texas, Kansas, and Oklahoma.

Q. In what branch of the business have you been engaged? A. In all its branches.

81 Q. All its branches? A. Taking leases, building pipe line, drilling wells, producing oil, pumping wells.

Q. Have you had anything to do with any other feature of the oil business, actual production, drilling, and so on? A. Taking leases.

Q. You have taken leases, have you? A. Oh yes.

Q. Are you—how long have you been in Oklahoma? A. Since the oil business started here.

Q. Do you remember about the date? A. About 1904.

Q. Are you fairly familiar with the Oklahoma fields? A. Most of it.

Q. Are you familiar with what is known as the Flat Rock Pool? The North Tulsa field? A. I have been out in the North Tulsa field.

Q. Mr. Mowris, this is a controversy involving the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North, Range 13 East, and the East 20 acres of Lot 2 of Section 19, Township 20 North, Range 13 East. The controversy is between Herman Knight, contestant, against Eva Waters, for the thirty acres first described, and between William J. Twist and Eva Waters, a minor, for the 20 acres last described. Have you been upon that land? It is in 19, 20, 13. A. Yes, I have.

Q. You may use the map here before you if it is of use to you, showing the land. When were you on this land, Mr. Mowris? A. Why, in August 1908, and in August 1909.

82 Q. When were you there in August, 1909, on what date? A. Why, on Monday.

Q. Monday, the 23rd? A. This week.

Q. Monday the 23rd. A. Yes.

Q. How did you happen to go out there on Monday, the 23rd; who asked you to go out, if anybody? A. Why I went out with Mr. P. J. White.

Q. Did you go for the purpose of making an estimate of the value of that property? A. I went out to look at it, and see if it was the same property that I had in mind a year ago.

Q. You investigated the property, then, on the 23rd of August? A. Yes sir.

Q. 1909? A. Yes sir.

Q. From your experience as an oil man and from your observation of this fifty acres, what would you say is the value of it for oil purposes, or for any purpose, what is the value of it, for the fee—fee to that land, free from any incumbrance, lease, mortgage, anything else? A. At what time?

Q. When you were there on yesterday.

Mr. COOK: August 23rd, 1909.

A. Well, I don't think I would want to give for those two tracts, the way they look now, or on the 23rd of August, more than twelve or fourteen thousand dollars for them.

Q. You mean for the fee? A. For the two tracts.

Q. I mean for the fee; I am talking now about the fee, if you were buying the thing outright, the whole fifty acres? A.
83 Yes, I would not give that for the lease on it.

Q. What would you give—I don't mean what you would give, but what is your opinion of the market value of the Herman Knight thirty acres? A. Oh, about a hundred and fifty or two hundred dollars an acre.

Q. What is your opinion of the value of the twenty acres? A. About the same.

Q. Hundred and fifty or two hundred dollars, I understand you to say? A. Yes.

Q. What in your opinion would have been a reasonable bonus to have paid for the whole fifty acres in April 1909, for a lease bearing a royalty of twelve and a half per cent? A. Oh a hundred dollars an acre would have been all I would pay—it would have been a big price to pay, I should think, taking into consideration the conditions of the oil business in Oklahoma.

Mr. ZEVELY: We object to that; purely argumentative.

Cross-examination.

By Mr. COOK:

Q. Mr. Mowris, what companies are you connected with? A. Vicmar Oil Company, and myself.

Q. Is that all? A. Yes.

Q. Do you represent any of the pipe lines? A. No sir.

Q. Not connected in any way with any of them? A. Not in any way at all.

84 Q. Mr. Mowris, have you any interest in any oil production contiguous to this fifty acres, about which you are testifying? A. No, I have no production in that pool.

Q. Are you interested in any companies that are producing in that pool? A. No, I just have a lease up there, is all.

Q. On what land? A. Nellie Bullette.

Q. How far is that from this fifty acres? A. Less than a mile.

Q. What direction? A. South.

Q. When you were out there on the 29th, did you observe how many wells there were, on the 23rd—how many wells there were immediately around the line of this fifty acres? A. I noticed it was pretty well drilled around.

Q. Have you any idea what production there is over this lease, immediately surrounding the land? A. Oh, I have the same idea other people have who hear the talk around.

Mr. ZEVELY: I object to any further questions about that; object to the question as incompetent, irrelevant and immaterial, not tending to prove any issue in this case.

Q. What is your opinion as to the production of those wells, if you have any?

Mr. ZEVELY: Same objection.

85 Q. Answer the question. A. My opinion is they are average wells.

Q. About how many barrels per day? A. Somewhere around thirty or thirty-five barrels.

Q. Is that based on personal investigation? A. No; that is based on my observation from experience through Oklahoma, that these wells, after they get their heads off, get down around thirty or forty barrels pretty soon.

Q. Do you know what the production of those wells were about April last?

Mr. ZEVELY: Same objection, Mr. Stenographer.

Q. Answer the question. A. I knew what the production was when they were fresh, when they commenced to get them in 1908.

Q. What were they at that time? A. Oh they would start off from hundred and fifty barrels on up.

Q. Up how far? A. Oh some of them, five or six hundred barrels.

Q. Any of them producing that much now? A. No sir, I don't think so.

Q. What time in 1908 was that? A. Along in the fall of 1908.

Q. You are an experienced oil man, are you not, Mr. Mowris? A. I am in the oil business; been producing oil.

86 Q. From your experience as an oil man, are you or are you not of the opinion that wells drilled in this fifty acres—

Mr. ZEVELY: How is that?

Q. I am asking him his expert opinion—what would be the production of wells drilled in the center of this fifty acres at this time?

Mr. ZEVELY: Objected to as incompetent, irrelevant, immaterial, and not tending to prove any issue in this case.

A. Whereabouts?

Q. Anywhere in the center of this tract of land. A. Could get some good wells in the center of it.

Q. Think you could get any of those five or six hundred barrel wells? A. You might.

Q. You reside in Tulsa, do you, Mr. Mowris? A. Yes sir.

Q. Have you been here continuously this summer? A. Yes, I have been here since June.

Redirect examination.

By Mr. ZEVELY:

Q. You think you would be likely to get a five hundred barrel well anywhere on this fifty acres? A. You might get a well or you might get a dry hole; I don't know. I haven't been down there.

W. S. MOWRIS.

87 HENRY STEINBERGER, being first duly sworn, upon his oath, deposes and says:

On direct examination.

By Mr. ZEVELY:

Q. State your name, Mr. Steinberger, and your occupation, and age, and residence. A. My full name is Henry Steinberger; my residence is Tulsa, and my occupation is the oil business.

Q. Your age? A. Fifty-seven.

Q. How long have you been in the oil business, Mr. Steinberger? A. About thirty years.

Q. Where? A. Well, I have been in the State of New York, Pennsylvania, West Virginia, part of Ohio, Kansas, and Oklahoma.

Q. How long have you been in the Oklahoma field? A. Been in the Kansas and Oklahoma field six years. Five years, at least.

Q. How long have you lived at Tulsa? A. Going on four years.

Q. Are you familiar with what is known as the North Tulsa oil field? A. Fairly well.

Q. Have you ever heard anything about the controversy pending in the courts and in the Department in which Herman Knight and William J. Twist are contesting the rights of Eva Waters, a minor, to certain lands out there? A. Yes sir.

88 Q. The lands in controversy, Mr. Steinberger, are the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4 and the East 20 acres of Lot 2, all in section 19, township 20 north, Range 13 East. You ever been on that land? A. Yes sir.

Q. When were you there? A. I just came through it, about an hour ago.

Q. You went out there today, did you? A. My business calls me through there nearly every day.

Q. Has your business called you through there frequently? A. Yes sir.

Q. For how long? A. The last five or six years.

Q. Have you been through there repeatedly since the lands immediately surrounding the lands in controversy were drilled up? A. Yes, I seen all of these wells drilled; that is, I seen them spring up, as I went through there.

Q. Do you know about how many wells are surrounding this fifty acres? A. I tried to count them the other day; I made them eighteen.

Q. Do you know anything about how much these wells produce? A. Well, I approximately know.

Q. Well? A. All got to guess at it, you know.

Q. Well, let's have your judgment about it. A. The wells on the north side of this thirty acres are whole lots the best wells; these down here are small.

Q. What are those on the north producing? A. Well, I would guess those wells out at fifty or sixty barrels, now.

89 Q. What about those on the south? A. Smaller wells; thirty or thirty-five barrel wells.

Q. What about those on the east? A. They are small wells.

Q. What about those on the west? A. They were good wells.

Q. What are they doing now? A. I suppose those eight wells, as near as I can find out from the boys, they are making between three and four hundred barrels.

Q. The eight? A. Yes sir.

Q. Mr. Steinberger, what is your opinion based upon your experience of thirty years in the oil business, and your knowledge of this surrounding country, having come in contact with it recently, as to the value of the fee to this fifty acres I have described to you, if it were free from incumbrance of lease or any incumbrance? A. Just now?

Q. Yes sir. A. I suppose they could get eighteen thousand dollars for that.

Q. About three hundred and fifty dollars an acre? A. Yes.

Q. I ask that for the—— A. I say probably could get that for it.

Q. I say, about three hundred and fifty an acre? A. Yes probably get that for it.

90 Q. Mr. Steinberger, what would be your opinion of what would have been a fair bonus to have paid for a- oil and gas mining lease—two oil and gas mining leases, one on the thirty, and one on the 20, in April of this year, considering that the royalty was twelve and a half per cent? A. On the whole fifty?

Q. On the whole fifty? A. Well, twelve thousand dollars would have been an awful big price.

Q. Twelve thousand dollars would have been a big price? A. Yes sir.

On cross-examination.

By Mr. Cook:

Q. Where do you live, Mr. Steinberger? A. Tulsa.

Q. Been here all the summer? A. Yes sir.

Q. Since Spring? A. Yes sir.

Mr. ZEVELY: I have endeavored to see what this is for. I interpose the objection to this question of incompetent, immaterial, and not being as to the issues of the case.

Q. You say you see this land frequently? A. Yes sir.

Q. How come you to see this land so frequently? A. Well, I have done a little work north of this; drilled probably twenty wells north of this field here, so I naturally have to go through this field to get to my own affairs.

91 Q. How far are your wells from this field? A. I have drilled wells as much as four miles north, and I am drilling now six miles north of this field, and one well eight miles north of this field.

Q. Have you any lease immediately surrounding this land? A. Not immediately surrounding this.

Q. How far is your nearest lease? A. We are about eight or nine miles north.

Q. Are you drilling for yourself or anyone else? A. I am drilling for myself, and I am drilling mostly by contract.

Q. Are you drilling by contract for any one immediately around this land? A. No sir, not down here.

Q. Mr. Steinberger, the longer—is it your opinion—is it or is it not your opinion that the longer these sixteen or eighteen wells you counted around these lands continue to operate or to be pumped, that it will depreciate the value of this fifty acres? A. The evidence now is that these wells are depreciating very fast.

Q. Have you an opinion as to the depth of the producing sand in this field? North Tulsa field? A. Well, we got three sands up there; this is about twelve hundred foot depth here.

Q. What is the depth of producing sand, after you get to the twelve hundred feet? A. This here?

Q. Yes. A. Well, I can't tell you absolutely to the foot. My understanding is the wells finish up a little better than twelve hundred and fifty feet.

92 Q. You don't catch the drift—the oil sand is at twelve hundred feet? A. Yes sir.

Q. The depth of the sand? A. I understand they drill from forty-five to fifty feet in it.

Q. How do you classify these oil sands?

Mr. ZEVELY: Let the objection stand to all of this.

A. Let me understand that question.

Q. You have a sand known as loose, medium, and firm, have you not? A. Oh yes.

Q. What is the sand in this particular field? A. It varies; where the wells are the best in the north part of these fields, pay sand was much thicker; when it got near the edge of it, the sand itself may be as thick, but the pay is much thinner.

Q. Is the field of such character that continuous drilling of wells immediately surrounding it, that it will draw oil from beneath this fifty acres? A. I surely think so.

Q. The longer they are pumped, the greater the depreciation in the land? A. Yes sir.

Q. Is there any way in which you could give an estimate as to the depreciation per month in this field, from the number of wells immediately surrounding it being pumped?

Mr. ZEVELY: I want to interpose the further objection
93 there that the question ought to be made more definite and specific, if it is applied to this land in controversy; the same objection that pertains to all these questions.

Mr. COOK: All right; answer the question.

Q. Surrounding this fifty acres? A. Yes sir; I have in mind a lease north of it, and I don't know just which one it is, that the production of the initial well was reported at a hundred barrels an hour; the chances are it never made twenty-four hundred barrels, but there are five wells there now, and the production is four hundred barrels. I seen that on the books the other day. I wouldn't

like to abuse the confidence of these people, but I know that to be right. Among them is this big well.

Q. Mr. Steinberger, if one well on a certain area of land, and afterwards it is drilled, putting in more wells, wouldn't it depreciate the production of the first well considerably? A. I think every well depreciates the production of the first well; there is so much oil an acre, the same as coal.

Q. Drilling other wells close to this big well, would have depreciated its production? A. That and the surrounding wells.

Q. Do you know what those wells are producing now? A. Which, those——

Q. Immediately around this fifty acres. A. These wells around here?

Q. Yes. A. All I can get at is, we size them up by the streams. Life would be too short for a disinterested party to gauge those
94 wells, but we think we can get close to it, and there might be better than sixty-five wells on the north side of that; White Brothers may have some better wells, but I don't think it.

HENRY STEINBERGER.

95 E. R. PERRY, being first duly sworn, upon his oath, deposes and states as follows:

Direct examination.

By Mr. ZEVELY:

Q. You are Mr. Perry? A. E. R. Perry, Attorney at Law; Tulsa, Oklahoma.

Q. You rather not tell your age? A. Rather not tell the age.

Q. Mr. Perry, do you represent any of the parties in the case in the Department, known as William J. Twist vs. Eva Water-, a minor, and in the mandamus proceedings now pending in the Supreme Court of the District of Columbia, known as William J. Twist, plaintiff, vs. Richard J. Ballinger, Secretary of the Interior? A. Yes sir, I am one of counsel for William J. Twist in all these proceedings.

Q. Were you in Washington in May of this year, when the proposition of compromise between Herman Knight and William J. Twist, on one side, and Eva Waters, through her guardian, on the other side, was presented to the Secretary of the Interior? A. Yes sir, I was.

Q. You participated in the argument of that controversy? A. Yes sir.

Q. Do you remember the date the Secretary of the Interior rendered his decision, awarding the lands in controversy to Herman Knight and William J. Twist? A. Yes sir; that was on the 10th day of May last.

96 Q. Did you subsequently to the rendering of that decision, have any conversation with the Secretary of the Interior upon this subject? A. Yes sir, two or three different occasions.

Q. When was the first one, if you remember? A. I cannot give

the exact date, but it was a few days, not more than four or five days after the decision of the 10th.

Q. With whom was that conversation? A. With Assistant Secretary, Franklin Pierce.

Q. And what was the conversation—just in substance? A. Why, I raised the question of the rapid drainage of the property, and he told me that he had authorized the lessees of William J. Twist and of Herman Knight, respectively, to take possession and proceed to operate the land by development. That he had authorized them to do this on the 10th, at the time he rendered decision awarding the land to them. Subsequently, I had another conversation with him, in the presence of Commissioner J. George Wright; at that time Mr. Pierce again said that he had authorized these lessees to go in and proceed with the development. Then about the 1st of June I believe, I am not sure as to the exact date, but it was sometime before the motion for review had been filed by attorneys for Eva Waters, Mr. H. P. Anderson of Tulsa, was in Washington, and he and I went together to Mr. Pierce's office, and Mr. Pierce again said that he had authorized us at the time that he awarded the land to Twist and Knight, respectively, authorized their lessees to take possession immediately, and proceed with the development of the property, because of the fact that it was being rapidly drained.

97 Q. You notified your client? A. Yes sir, I wired immediately after the decision of the 10th, giving the substance of the decision, including the authority granted by the Assistant Secretary Pierce, to go in and develop.

Cross-examination.

By Mr. Cook:

Q. Have you that telegram? A. No; naturally I wouldn't have it.

Q. Have you a copy of it? A. No. I just handed in a telegram at the office in Washington.

Q. Who was it sent to? A. It was sent to H. P. Anderson.

Q. Do you know whether he received it?

Mr. Cook: Just for the purpose of objecting.

Mr. ZEVELY: All right.

Q. Do you know whether he received it? A. Yes. He wired back the next day, stating the telegram was received, and asking some further information on the subject as to when deeds would issue.

Mr. Cook: I object to the testimony of the witness as to the telegrams. The telegram is in existence, and is the best evidence.

98 Direct examination.

By Mr. ZEVELY:

Q. Mr. Perry, were you present at a subsequent—on a subsequent date, in the Department of the Interior at Washington, when Mr. Assistant Secretary Pierce granted what he termed a motion for

rehearing or reopening of this case, which had been settled on the 10th of May? A. On the——

Mr. Cook: Wait a minute. I object to the witness answering the question as propounded by Mr. Zevely, because it presupposes the case had been settled, and there is no evidence introduced showing that it had been settled prior to that date.

A. On the 21st of May I was requested by Mr. Severn to come to the office of *the* Secretary Pierce, at the Interior Department. I did so, and I found there Mr. Severn and Mr. Scofield, of Westville. They had presented a motion for the rehearing or review, rather, of the case, together with a motion to set aside a confession of judgment. Mr. Pierce then announced that he would give them thirty days from the 10th day of May in which to file their motion.

Q. Who is Mr. Severn? A. Mr. Severn is an attorney in Washington, of the firm of McCoy, Severn & Mark.

Q. Is he the gentleman now with Mr. Cook? A. Yes sir.

Q. And who is Mr. Scofield? A. Mr. Scofield, I believe, is an attorney of Westville.

Q. Is he here? A. Yes sir.

99 Q. The attorney with Mr. Cook also? A. Yes sir, he is there.

Q. Did you have any subsequent interview with Mr. Pierce relative to this subject? A. Yes sir, on the 24th of June, I, together with Mr. J. M. Givens, of the firm of Zevely, Givens & Smith, who was there representing both the Twist and Knight interests, were summoned to go before Secretary Pierce. We did so on that day and Secretary Pierce announced he would set aside the confession of judgment, and set both cases for trial on their merits.

Q. Did he assign any reason for his action? A. Mr. Pierce talked but very little when he gave that decision. He said that he had arrived at the conclusion that he ought to set aside his former ruling awarding the land to Twist and Knight respectively. The only reason that he alleged was that at the time he made the original decision on the 10th of May, he had not had sufficient evidence as to the value of the land in controversy.

Cross-examination.

By Mr. Cook:

Q. Did Mr. Pierce make a decision to that effect?

Mr. Cook: Just for the purpose of objection.

A. Mr. Pierce made that statement. Wouldn't call it a decision, exactly.

Q. You don't know whether he rendered that decision?

100 A. Decision to what effect?

Mr. ZEVELY: Let him make his objection.

Mr. Cook: Go ahead, then.

Mr. ZEVELY:

Q. Mr. Perry did Mr. Assistant Secretary Pierce, on the 24th of

June, in making his statement, decision, or whatever you term it, say that he had been misled at any time, by anybody for a reason for setting aside his former decision? A. There was absolutely nothing of that kind said by Mr. Pierce at any time.

Cross-examination.

By Mr. Cook:

Q. Mr. Perry, as a matter of fact, was not the conversation you refer to as having taken place before Mr. Pierce on the 21st day of May, when Mr. Scofield and Mr. Severn were there, that Mr. Severn and Mr. Scofield requested Mr. Pierce to permit them to examine the record in this contest proceeding for the purpose of having a motion to review his decision? A. Well, that is really in my judgment rather a quibble. It was Mr. Pierce's talk—it was to the effect that Mr. Severn and Mr. Scofield would be given until the 9th day of May, 9th day of June, which would be thirty days from the decision on the 10th of May, in which to examine the record
101 and file their motion for a review of his decision.

Q. Of his decision? A. Of his decision of May 10th.

Q. What was that decision of May 10th? A. That decision awarded the land in controversy to Twist and Knight respectively, without any frills.

Q. Was that made in the nature of compromise in the proceedings affecting this land at that time? A. That was made in the way of acceptance of the confession of judgment filed by the guardian of Eva Waters.

Q. Wasn't an offer of twenty-five thousand dollars made as a compromise to clear up the proceedings pending effecting a contest on this land? A. The whole compromise naturally would have the effect of staying all proceedings in the cases on their merits; from the time the guardian first confessed judgment, until the confession of judgment by him was approved by the Secretary.

Q. These conversations you related here as having taken place with Secretary Pierce, at the time this compromise was being spoken of—— A. Now, I don't understand; I have spoken of conversations I had with Secretary Pierce all the way from——

Q. Relative to the time you alleged you were instructed authorized your people to proceed with drilling, for the reason that the land was being rapidly drained? A. Put that question directly.

Q. Read the question (question read). A. Well, that is a qualification; what is the question?

102 Q. Were those conversations—did those conversations take place at the time you discussed this compromise, by your people paying twenty-five thousand dollars for this lease? A. No; all of the conversations that I have narrated took place after the Secretary had approved the confession of judgment, and had authorized us to go into the possession; he authorized us at the time he approved the confession of judgment on the 10th day of May. The conversations I have narrated all took place after that.

Q. What date did this conversation relative to your being instructed as to the drilling, take place? A. As I said before, the first

one after the decision was handed down awarding the land to Twist and Knight, three, four or five days after that. About the 14th or 15th. Then at a time subsequent, with J. George Wright present.

Q. What date was that? A. I am sure I cannot state the exact date, but approximately the 25th or 26th of May; then subsequently with Mr. H. P. Anderson, which—this is only an approximation of the date—I have a very clear recollection of the incident, but the exact date, I think was about the 4th or 5th of June.

Q. What was the conversation had with Mr. Pierce at the time Mr. Wright was present? A. I asked Mr. Pierce the question whether, on account of the new complications having come up and the time having been granted Mr. Severn and Mr. Scofield in which to file their motion for review, whether the authorization he had previously give to go ahead with work on the lease, still held
103 good, and he said that it did. Now, the conversation had when Mr. Anderson was present, Mr. Anderson carried on that conversation with Mr. Pierce. He asked Mr. Pierce if he, Mr. Pierce, had authorized us to go ahead; take possession and go ahead with the work, and Mr. Pierce said that he had.

Q. Now, what did Mr. Pierce say that led you to believe — was an authorization for you to proceed with the drilling of this land? A. Mr. Pierce said that we were to take possession and proceed with the development of the property; that was my understanding, without any qualifications, was what Mr. Pierce said.

Q. That was in the presence of J. George Wright? A. In the presence of J. George Wright, and also in the presence of Mr. Anderson, later on.

Q. Mr. Wright present at the second conversation with Mr. Anderson? A. No sir.

Q. That took place in June? A. The second conversation at which Mr. Anderson was present, took place, as I remember, the 4th or 5th of June. The whole tenor of the conversation was to the effect that we were to protect the land by drilling on account of its being drained.

Q. What date did you say this conversation, in the presence of Mr. Wright, took place? A. It was after the 21st of May, and I think it was along about the 24th or 25th.

Q. Are you sure it was after the 21st? A. Yes, I am sure
104 it was after the 21st.

Q. Can you repeat the exact words of Mr. Pierce, authorizing you to proceed with drilling on this land? A. No, I cannot repeat the exact words; can repeat the substance, as I have a dozen times.

Q. How long have you been practicing law, Mr. Perry? A. At Tulsa, three years.

Q. Have you ever had any practice before the Five Civilized Tribes? A. Yes sir.

Q. Did you ever have any contest cases? A. Yes sir.

Q. Are you familiar with the contest rules? A. Not as familiar as a man ought to be.

Q. You have read them, haven't you? A. Haven't read them all.

Q. You had some cases there? A. Yes, this one, for instance, and one or two others; not very many contests before the commissioner

Q. When were you admitted to practice before the Department and the Commissioner? A. I was admitted to practice to law four years and a half ago, at Nowata.

Q. Before the Department, I am referring to, Mr. Perry, the Commissioner to the Five Civilized Tribes. A. Why, I never went through any preliminary examination or motion, anything of that kind, to get the right to practice before the Commission or Agency, or Department.

Q. You have appeared, then, and participated in contests, have you not? A. Yes sir.

Q. And you have filed papers in contest proceedings there?
105 A. Yes sir.

Q. You say you don't remember what the words of Mr. Pierce were at the conversation with Mr. Wright, when he authorized you to drill on this land? A. No; I naturally cannot remember the exact words at this distance.

Q. Remember anything near what he said—any of his words? A. The question was as to whether the lessees of Twist—who was the only one that I was personally interested in—were authorized to go ahead with the development of the property. Just how many words he used or what they were, I cannot say, but the whole tenor of the answer was that we were authorized to go in and get to work.

Mr. ZEVELY: That applied to the thirty acres as well as to the twenty?

A. Yes sir; applied to the whole fifty.

Q. Now, when you were present at the time when Mr. Severn and Mr. Scofield came in relative to filing a motion in this proceeding, to review the former decision of the Acting Secretary, did you hear him tell them they had until the 9th of June, in which to perfect that motion? A. Yes sir; I registered an objection to it.

Q. What was your objection? A. That the time was too long; if he was going to attempt to do anything whatever, that the time was too long.

Q. That was the only objection in your opinion, that
106 the time was too long? A. I objected to the whole proceeding and particularly to the time—length of time given. Mr. Scofield said at the time he thought he could get through in about a week; well this was the 21st, and they practically asked for only a week, and they were given over two weeks. We objected, of course, to the whole proceeding.

Q. The decision had been rendered May 10th? A. May 10th, yes sir.

Q. Have you been here all the summer? A. Yes sir, except two months I was in Washington.

Q. When did you come back? A. Came back about the 1st of July.

Redirect examination.

By Mr. ZEVELY:

Q. At the time Mr. Assistant Secretary Pierce, on the 6th day of May, at the conclusion of the oral arguments, said that the offer made by Knight and Twist were not sufficient, do you remember why he said he would not approve that compromise at twelve thousand dollars?

Mr. Cook: I object to that question because it is not shown that he knew why the Secretary said that.

Q. I asked him if he heard the Secretary say. A. The Secretary said he knew personally about the value of this land, and in his judgment it was not enough; said he had seen the land himself.

107 Recross-examination.

By Mr. Cook:

Q. Did that conversation take place at the time you were trying to effect a compromise as to this land? A. Yes, before the compromise was finally approved by the Secretary.

Mr. Cook: I ask that that be stricken out, the conversation affecting the compromise, as not subject to examination in this testimony.

E. R. PERRY.

AUGUST 25, 1909—10 o'clock a. m.

W. A. MARTIN, first being duly sworn, upon his oath, deposes and says:

On direct examination.

By Mr. ZEVELY:

Q. State your name and age and residence and occupation, please Mr. Martin. A. W. A. Martin; Bartlesville, Oklahoma.

Q. What is your occupation? A. Superintendent of oil wells.

Q. What is your age? A. Thirty-three.

Q. How long have you been engaged in the oil business, 108 Mr. Martin? A. About fifteen years.

Q. In what capacities have you been engaged in the oil business? A. Well, in all lines, I guess.

Q. All lines of it? A. Yes sir.

Q. What are you doing in the oil business now? A. Superintending oil wells.

Q. For whom? A. Well, for Mr. H. F. St. Clair, the Alpine Oil Company; Howe Oil Company; Fulton Oil Company, and the Portland Oil Company.

Q. Are you familiar with the fifty acres of land in the North Tulsa Oil fields, known as the Knight-Twist piece of land 30 acres claimed by Herman Knight and 20 acres by Twist? A. Yes sir.

Q. You know about that land, do you? A. Yes sir.

Mr. ZEVELY: Put in the description, if you please.

N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. W. 4, and the East 20 acres of Lot 2, all in Section 19, Township 20 North, Range 13 East.

Q. Are you employed in the vicinity of this fifty acres of land now? A. Yes sir.

Q. Where? A. On the Alpine Oil Company's.

Q. On what land, if you can tell from this plat? A. Well, it is on the Kelley and Connor fifty-acre farm.

Q. What is the position of that Kelley and Connor fifty with reference to the Herman Knight thirty acres? A. Well, it
109 lays to the north of the Herman Knight.

Q. Adjoins it on the north? A. Yes sir; also have this Albert T. Lloyd, adjoining it on the south and east, and the Margaret Lloyd on the east.

Q. How long have you been employed out there, Mr. Martin, on these two tracts of land that you speak of? A. Since last September.

Q. Have you been in charge of the drilling on those two tracts of land? A. Yes sir.

Q. What company owns the lease—what company is drilling on the Kelley and Connor tract? A. The Alpine Oil Company.

Q. What company is drilling on the Carrie Keys tract? A. The Little Rock Oil Company.

Q. Have you superintended the operations on the Kelley & Connor tract from the beginning? A. Yes sir.

Q. How many wells are drilled there? A. Thirty-two wells.

Q. On the Kelley-Connor tract? A. On the Alpine Oil tract.

Q. How many on the Kelley-Connor? A. Nineteen.

Q. You superintend the drilling of all these wells, Mr. Martin? A. Yes sir.

Q. When was the first well drilled there, approximately? A. August or July—July or August; August, I think.

Q. What year? A. 1908.

Q. Last year? A. Yes sir.

110 Q. What was the initial capacity of the wells on the Kelley-Connor tract? A. Do you mean now?

Q. No, the beginning, at the beginning, when you brought them in? A. Well, anywhere from three to five hundred barrels.

Q. From three to five hundred barrels? A. At that time.

Q. Was that so of all of the nineteen wells on that fifty? A. No sir; well, practically so.

Q. Wasn't any over five hundred? A. No average over five hundred; not in the course of twenty-four hours.

Q. How long would they keep up at that production? A. Well, probably two weeks to thirty days.

Q. How long since you drilled the last well on that piece? A. The 19th of this month.

Q. What are the wells that were brought in during August, September, and October last year, doing now? A. Well, in the neighborhood of fifty barrels apiece.

Q. How many have you drilled recently? A. Four wells.

Q. And when were they brought in? A. This month; the 7th, 9th, and 19th.

Q. Where were these wells with reference to this Herman Knight tract of land? A. Right on the north line.

Q. How much did those wells do when you brought them in? A. The four of them were doing about three hundred barrels.

Q. Altogether? A. Yes sir.

111 Q. What did they come in at—any head on? A. About seventy-five barrels apiece.

Q. They are still doing that? A. Yes, they are just lately in.

Q. Shot them yet? A. Yes sir.

Q. On the pump, are they? A. Yes sir, two of them are flowing and two on a pump.

Q. Now, when did you drill the wells on the Albert Lloyd ten acres, which lies—which is the southeast corner of the forty in which the Herman Knight thirty acres are situated? A. Well, sir, one of those wells was drilled in December, and the other one in—

Q. December, 1908? A. Yes sir.

Q. And the other one? A. The other one was drilled in the latter part of March or the first of April; I don't remember the date.

Q. This year? A. Yes sir.

Q. What are those wells doing? A. About fifty barrels apiece.

Q. What did they do when brought in? A. Well, one of them came in about three hundred barrels and the other a hundred barrels.

Q. And they are now doing, you say, fifty barrels apiece? A. About fifty barrels apiece.

Q. Now, are those all of the wells, Mr. Martin, that you have superintended the drilling of there, immediately in the neighborhood of this land described? You have not drilled any other
112 wells around this tract, have you? A. No sir, I have not, except on the south here and north and east.

Q. Which is those we have talked about? A. Yes sir.

Q. Now, are you familiar with the other wells that have been drilled in the land—on the land surrounding the Wm. J. Twist 20 acres and the Herman Knight 30 acres? A. Well, I don't just gauge them, but I know in the neighborhood of what they are doing.

Q. You are about there all the time? A. Yes sir.

Q. And from your experience and observation, you can tell? A. Yes sir.

Q. That is of your own knowledge? A. Yes sir.

Q. How many wells are on the west of the William J. Twist 20 acres; look at this map here. A. I am not positive, but I think there is four wells on that line, and three up on this one; I think there is four wells.

Q. Know how long those wells have been in? A. Well, sir, they was drilled in last winter sometime; I think about January or February.

Q. By whom, if you know? Who owns the leases? A. Mr. McFarland.

Mr. COOK: What land is that?

Mr. ZEVELY: The land immediately on the west of the William J. Twist.

Q. Those allotments, parts of the allotments of Rufe Brady and Henry Brady. What did those wells do when they were brought in, if you know? A. Well, in the neighborhood of two to three
113 hundred barrels apiece.

Q. What are they doing now? A. Well, I should estimate it at fifty barrels apiece.

Q. Now, Mr. Martin, on the south here and coming over to the William J. Twist allotment, containing 35.41 acres, that is south of the William J. Twist 20, here in controversy; know anything about these wells on the southeast? A. Well, not very much; they all was fair; I never paid much attention to them.

Q. You cannot testify as to that? A. Well, here is a well doing about twenty barrels.

Q. That is a well on the Eliza Lloyd 80 acres? A. Just across the line.

Q. From the Herman Knight? A. About a 20 barrel well.

Q. Are there any dry—been any dry holes drilled in this vicinity? A. Yes sir; there is a dry hole drilled down here in the Nancy Lloyd—I believe right in this corner; that would be in the northwest corner.

Q. That is on the south—immediately southeast of the Albert Lloyd 10 acres; about how far is it from the Albert Lloyd 10 acres?

A. Well, it is 200 feet each way; 284 feet from the southeast corner.

Q. From the northwest to the southeast. Mr. Martin, what about the other wells that have been drilled on the north here, in the Payne tract, for instance? A. Well, those wells came in two to three hundred barrels apiece.

114 Q. How long have they been in? A. They were drilled last winter.

Q. What are they doing now? A. In the neighborhood of fifty barrels.

Q. About fifty barrels. Now, Mr. Martin, you say that you are superintendent for the Alpine Oil Company. How many wells has the Alpine Oil Company in the immediate vicinity of this land in controversy? A. Thirty-two wells.

Q. Do you ever gauge those wells? A. Every day.

Q. How much did these thirty-two wells produce yesterday? A. Fifteen hundred barrels.

Q. Were the wells all producing yesterday, all the 32? A. Well, nearly so; all but about five of them.

Q. Four or five of them were off yesterday. Now, you say there were five off. In your operation of thirty-two wells, is there ever a day when they are all on? A. I don't think so; not in that many wells.

Q. You stated what the production was yesterday; what has it

been, approximately, a day for the last two months, on these thirty-two wells? A. Well, in the neighborhood of 1500 barrels.

Q. Kept about the same? A. Yes sir.

Q. Do you know what it was in April 1909? The latter part of March and the first of April? A. About, probably twenty-one hundred barrels.

Q. Probably twenty-one hundred barrels.

115 On cross-examination.

By Mr. Cook:

Q. You say you live at Bartlesville? A. Yes sir.

Q. Been in the oil business for fifteen years? A. Yes sir?

Q. Where? A. Well, at Sistersville, West Virginia, and this western field.

Q. Stay at Bartlesville most of the time now? A. Now, sir; I stay here most of the time.

Q. Are you here continuously? A. Well, not every day in the week.

Q. How many days in the week do you spend here? A. Usually about five.

Q. Is all of your time, when you are here, spent out there on that property you testified about? A. Yes sir.

Q. Will you tell me whose allotment this Kelly-Connor farm, you spoke of, is on? A. Whose allotment it is on?

Q. Yes; if you know; who is the Indian to whom that land was allotted? A. Jennie Archilla.

Q. Is the Kelley and Connor, Fred Kelley and Lon Connor, of Vitnia? A. Well, I don't know the gentlemen; I met Mr. Connor, but I don't know where he is from.

Q. Who are you operating that land for? A. The Alpine Oil Company.

Q. They have a sub-lease on it? A. They have a lease on it.

116 Q. You say there are 19 wells on that piece of land? A. On the fifty acres, yes sir.

Q. What is the location of those wells, relative to the fifty acres in controversy in this matter? A. Which, those nineteen wells?

Q. Yes sir. A. Well, they lay to the north of that fifty acres.

Q. How far to the north? A. Well, there is four of them not very far from the line, about fifteen feet, I should judge. From eleven to fifteen feet.

Q. Where are the other fifteen? A. Well, they are located—they are drilled around the line, about a hundred feet from the line, on the fifty acres, as near as I could designate it.

Q. Do you go clear around the line? A. Yes sir.

Q. Have you got any wells on this Kelley-Connor farm off-setting the four wells immediately north of the Eva Waters land? A. Off-setting the four wells?

Q. Off-setting the four wells that you have drilled north of the Eva Waters land? A. Have we got four wells off-setting four that were drilled on that line?

Q. Yes sir. A. Well, they don't exactly off-set them; drilled kinder between them.

Q. How far away from them? A. The other wells are two hundred feet, and these were drilled right on the line.

Q. How many wells come two hundred feet from these four wells drilled right on the line? A. Three wells.

117 Q. Where are your other 12 wells? A. Where are which?

Q. The other 12 wells of the 19 on this land? A. Well, they are drilled right along the line on that 50 acres.

Q. And you have seven wells within two hundred feet of the north line of this land in question here, have you? A. Yes sir.

Q. What are the production of those 7 wells, if you know? A. Well, about 450 barrels, them seven wells would do.

Q. For the seven? A. Yes sir.

Q. Are those wells immediately north of the line, producing the oil—immediately north of the Eva Waters land, producing more than the other wells on the Jennie Archilla allotment? A. Well, those four wells produce a little more because they are drilled just lately, the head ain't off them yet.

Q. When were those four wells drilled? A. Drilled on the 5th, 7th, 8th, and 19th.

Q. Of this month? A. Yes sir, of this month.

Q. Then, if Oil Inspector Hamilton made a diagram of this map April 17th, 1909, showing that there were four wells on this land immediately north of the line at that time, was he mistaken?

Mr. ZEVELY: Object to the form of the question. It ought to be more specific and set up the distance which Inspector Hamilton's report shows four wells to be from the line, to enable the
118 witness to answer it intelligently. You can see by an investigation of this plat, there were four wells on that land two hundred feet——

Mr. COOK: That plat has never been sufficiently identified to be considered. Never been identified, to show the time it was made. Your witness was absolutely silent at the time of the making of that map.

Mr. ZEVELY: I will show that by Mr. White.

Q. Then you can tell me—I will withdraw that question, as Mr. Zevely seems to think it is unfair. Can you tell me how near the four—were there any wells within two hundred feet of the north line of the Eva Waters property in April last? A. Were there any wells within two hundred feet?

Q. On your Kelley-Connor farm? A. Yes sir.

Q. How far were those wells from the line? A. Two hundred feet.

Q. Now these wells you have drilled in this month, are between those wells and the line, are they? A. Yes sir.

Q. And they are right on the line? A. Yes sir.

Q. And what are their production? A. Well, the four wells are doing about three hundred barrels.

Q. What was their original production? A. Well, that is just about what they came in at; they have lately come in.

Q. Are they all flowing wells? A. Two of them isn't.

Q. Are you pumping them? A. Yes sir.

119 Q. How long have you been pumping them? A. Well a little over a week.

Q. Are you pumping them to their full capacity, Mr. Martin? A. Well, as near as we can; I think so.

Q. How many hours a day do you pump these wells? A. About twenty-four hours.

Q. Do you pump all of them on your farm 24 hours? A. Yes sir.

Q. Did you pump all of them yesterday 24 hours? A. Yes sir.

Q. Then you were mistaken when you said five of those wells were not operating then? A. There is five wells not operating, but not them.

Q. On this farm isn't it? A. Yes sir.

Q. What five wells are not pumping? A. Five, not all on the Archilla farm; in the 32.

Q. The 32 wells referred to are not on the Archilla farm? A. Not all of them; 19 on that farm.

Q. How many of these 19 wells were not being pumped yesterday? A. About three of them.

Q. Where are those three wells located? A. Well, I would have to show you on the map.

Q. All right, sir. A. Right here is one well, and here is another one.

Mr. Cook: Witness indicating to the north.

A. 460 feet from the north.

120 Q. 460 feet from the north line of the Jennie Archilla allotment? A. Yes sir.

Q. And how far is this one on the east here? A. That would be about six hundred feet.

Q. Six hundred feet from the ——. A. From the south boundary—460 feet from the south.

Q. How far? Where is that other third well, now, on that allotment not being pumped yesterday? A. That was this one right here.

Q. How far is that from the north line of the Jennie Archilla allotment? A. Two hundred feet.

Q. What is approximately the distance from those three wells to the land in controversy now? A. That would be 860 feet; and this one would be 460, and that one would be 1160.

Q. Now, you have got 12 wells in between these three wells not being pumped yesterday, and the land in controversy, now according to that map, have you? A. 12 wells that was pumped yesterday.

Q. Yes, according to that plat there? A. I don't just understand your question.

Q. I say there are 12 wells that were being operated yesterday on this Kelley-Connor farm, which lie between the land in controversy

here, known as the Eva Waters allotment, and the three wells not operated yesterday, lying from eight to eleven hundred feet from the land. A. You mean these other 12 wells we had pumping?

Q. Yes; lying in between Eva Waters' land and the wells that were not pumped yesterday. A. Yes sir.

Q. How long have those three wells been idle? A. Well, 121 I don't just remember the date.

Q. Well, about how long? A. Well, probably thirty days.

Q. What is the reason, if you know, why these wells were not pumped? A. Well, some of them were flowing; we have not put them to pumping yet, and they quit flowing.

Q. They have been flowing wells? A. Yes sir.

Q. How many of these 12 wells immediately north of this line of this land, and three of them a little to the northeast of the Eva Waters property, were flowing wells? A. How many of these were flowing wells?

Q. Yes, right along the line? A. You mean these three wells?

Q. How many of those wells were flowing wells—thirteen? A. How many are flowing?

Q. Yes sir. A. There are three of these wells flowing.

Q. What is the capacity of those three flowing? A. Well, it is pretty hard to tell exactly; them four wells there are doing about three hundred barrels, and them others are about 50 barrels apiece. Average that on the Kelley-Connor farm.

Q. Would those wells produce more oil if they were pumped, after they quit flowing, than they are producing now flowing? A. I don't think so; my experience has not taught me that.

122 Q. Flowing wells produce more than wells pumped? A. I think they do, because they produce every day, and pumping wells are off now and then.

Q. What is the usual distance between wells drilled? A. Usually drill about 260 feet apart.

Q. You have come in within two hundred feet from this north line and put three additional wells, have you? A. How is that?

Q. You have come in within two hundred feet of the Eva Waters allotment, and put three additional wells, haven't you, this month? A. Four additional wells.

Q. Do you know what the capacity of those four wells you say lie two hundred feet north of the Eva Waters land were in April of this year? A. Which?

Q. Those four wells that are two hundred feet north of this Eva Waters land, what was their production in April, about the middle of April last? A. Well, I should estimate them in the neighborhood of 75 barrels apiece at that time.

Q. Then if the Oil Inspector, Hamilton, gauged these wells the 17th day of April, 1909, at 200 barrels apiece, was he mistaken? Answer the question. A. How is that?

Q. Repeat the question, please. (Question read). A. I don't know the man.

Q. Well, you can answer that question, as to whether or not if he reported that those wells had gauged them and they were pro-

ducing two hundred barrels the 17th day of April, 1909, was that
a mistake on his part, you think? A. Which four wells did
123 he gauge?

Q. These which you say are two hundred feet north of
the line, and he says they are 150 feet north of the line; those four.

Mr. ZEVELY: Answer the question, Martin; tell them about what
those wells are doing.

Q. That question is very plain, Mr. Martin. You can answer
it yes or no. A. Well, I estimated the wells at that time as near
as I could.

Q. Did you make that estimate from now or from actual knowl-
edge of those wells at that time? A. Well, from now.

Q. As a matter of fact then you don't know certain what they
produced in April, do you? A. Well, not exactly, but they produced
in the neighborhood of that amount; 75 barrels apiece at that time.

Q. How often do you gauge these wells? A. Well, the wells are
gauged every day in the week.

Q. How long have you been gauging the wells? A. Ever since
the property started.

Q. Every day since the property started, you have been gauging
them? A. Yes sir.

Q. Mr. Martin, when were those four wells that we are speak-
ing of drilled in on this land? A. Which four do you mean along
the line of north here?

Q. Two hundred feet north; the first wells that were put in there?
A. Well, the first one was drilled last July or August; and the rest
of them were drilled since they was completed tho, along
124 in the winter.

Q. Just approximately.

Mr. ZEVELY: I can refresh his memory and give the exact dates,
if you want them.

Mr. COOK: Yes, then give the dates.

A. No. 1 in the southwest corner, drilled August 8th, 1908;
that is two hundred feet from the line. And the one east of that—
next east of that, was drilled February 21, 1909; and the one next
east of that was drilled November 21, 1908.

Q. Now, about the other one east of that? A. February 20th,
1909.

Q. Drilled No. 2 and No. 4 about the same time, just a day be-
tween the time you brought them in, the second well from the west
side and the fourth from the west side, drilled in February 21st and
20th, were they? A. Yes sir, them wells were drilled very close
together.

Q. Have you got any record in your possession showing the daily
output of these wells from the time they were brought in up to the
present time? A. Not in my possession I have not.

Q. Do you know what those wells originally brought in, can you
designate their—at the time of their drilling, what their initial
production was per well? A. Well, not hardly.

Q. Well, about what did they bring in? What did they come in at? —. —.

125 Q. Commencing from your map, there in the southwest corner. A. Outside of those four wells?

Q. No, those four wells we have been talking about. A. Those wells would come in from three to five hundred barrels apiece; what they come in at for a few days.

Q. The first few days after they were brought in? A. Yes sir.

Q. What are those doing now? A. Well, I say, them wells averaging about 50 barrels apiece.

Q. And those same wells, according to your testimony, were averaging 75 barrels in April last? A. Well, in the neighborhood of that.

Q. Has your figures and estimate as to the production of these wells—are they as accurate as to the other as they are to these? A. How is that?

Q. Are your figures relating to the production of these 19 wells on the Jennie Archilla allotment equally as accurate as to the production of these four wells, you are speaking of? A. Well, hardly; I watched them four pretty close.

Q. Watched them four closer. Taking those four wells we are speaking of, when you gauged them yesterday, what was the production of each well? Commencing at the well on the southwest there, and going across. A. Well, in the neighborhood of three hundred barrels.

Q. Each? A. No, the four of them.

Q. The four of them. You don't remember, do you, the production of each. A. No sir.

126 Q. How many wells did you state you had down in the Albert L. Lloyd land, lying immediately southeast of this Eva Waters property? A. We have two wells there.

Q. What is the production of those two wells? A. They are doing about two—the two wells are doing about a hundred barrels.

Q. When were they brought in? A. One of those wells was drilled in in December, 1908, and the other one in March or April, I don't just remember the date.

Q. And what was their original production? A. Well, the first one drilled was in the neighborhood of three or four hundred barrels somewhere, and the second was about a hundred barrel well, when they come in.

Q. Now, what other lands are you controlling in the neighborhood of this land, Mr. Martin, if any? A. You mean at the present?

Q. Yes sir. A. None at the present.

Q. Just those two tracts; that of the Alpine. You got the Carrie M. Keys and Little Rock, haven't you? A. No sir.

Q. You don't work for the Little Rock? A. No sir.

Q. Just those two? A. No, we have the Maggie Lloyd there; I understood you in the question to ask me what we are drilling in; these wells are drilled; operating.

Q. What wells you are operating on? A. That is different. Got the Maggie Lloyd.

127 Q. Where is that located from the Albert Lloyd, right east? A. Here is the Margaret Lloyd.

Q. Where is the Albert Lloyd, on your map? A. Right here, and we have the Rosa Lloyd.

Q. Go ahead. A. Have the Rosa Lloyd and the Laura Lloyd.

Q. These lands lie—— A. East of the Archilla land. This is the Rachael Lloyd; this is the Little Rock.

Q. Now, your experience and long connection with the oil business, Mr. Martin, from these wells you are operating in the vicinity of this Eva Waters land, now, what per cent. oil do you think is drawn from under the Eva Waters allotment? A. Well, I can't say as to that.

Q. Can you estimate? A. Well, it would be a hard thing for me to do.

Q. What is your opinion as to the condition of this pool there; is it one pool? In this North Tulsa field? A. Yes, I should think it was one pool.

Q. Then if this is the case, then from every well that is drilled into that pool, will draw oil from off the—under the under surface, will it not? A. Well, I can't say as to that; I don't know anything about it down under the ground that far.

Q. Well, from your experience, operating oil wells, do you or do you not believe that the seven wells you have got immediately north of this Jennie Archilla land—north of the Eva Waters land, is drawing oil from under that land? A. Well, I don't know that it is.

128 Q. Well, is it your opinion as an oil man, whether or not it is? A. It might be drawing some.

Q. Well, what per cent.? A. Oh I can't estimate that at all; can't have any idea.

Q. But you have been in the oil business twenty-three years? A. Not twenty-three years.

Q. Fifteen years. Did I understand you to testify that in April the production from these wells on the Jennie Archilla land amounted to twenty-one hundred barrels? A. In the Jennie Archilla land.

Q. Was it the thirty-two wells? A. The entire thirty-two wells, yes sir.

Q. What is the relative production, Mr. Martin, of the wells in the south part of the Jennie Archilla allotment and those in the north? A. Well, they average pretty near the same.

Q. Over the entire allotment? A. Yes sir.

Q. Which, in your opinion, are the best? A. Well, them wells average about the same.

Q. Practically no difference then? A. Very little.

Q. Do you know anything about the production of the four wells on the Brady allotment, immediately west of this Eva Waters land, both Henry T. and Ruff T.?

Mr. ZEVELY: Call it the Island Oil Company.

Q. The Island Oil Company? A. I should estimate them wells in the neighborhood of fifty barrels.

Q. How long have them been flowing about fifty barrels?
129 A. They are pumping.

Q. How long have they produced fifty barrels, if you know?
A. I can't say.

Q. Remember anything about them about April as to their production? A. Well, I don't remember back that far.

Q. Have you an opinion as to where the heart of the production in this field would likely be found? A. No, I can't say as to that.

Q. Is this Eva Waters land about the middle of that field? A. Well, it looks to me like it is a little to the south. That is just my idea of it.

Q. Where was that dry hole, you testified about, awhile ago—on what land? A. That is on the ——— Lloyd.

Q. How far away is that from the land in question, Eva Waters land? A. Well, from the southeast corner it would be about 860 feet, in the neighborhood of that.

Q. Is that the only dry well that has ever been brought out in that field? A. That is the only one I know of, right in there close.

Q. All the other wells drilled around this land have been producers, have they? A. Yes sir.

Q. And are still producing? A. Yes sir.

130 Q. Are you connected, directly or indirectly with either the Island Oil Company, Lons Angeles-Cherokee Oil Company, Little Rock Oil Company, or the Justin Oil Company? A. I am not connected either directly or indirectly with the first three you spoke of; the last one I am looking after their property.

Q. The Justin Oil Company? A. Yes sir.

Q. Working for them? A. Yes sir.

Q. What lands have they under lease immediately around this land? A. Well, they have the Margaret Lloyd and the Albert Lloyd; I guess that is all.

Q. Who has the lease on this Carrie M. Keys 10 acres? A. The Little Rock.

Q. You have no connections with them? A. No sir, none whatever.

Q. Mr. Martin, from your familiarity with this North Tulsa field, and your knowledge as to the production of the various wells, what in your opinion is the best part of that field? A. Well, I should think the Kelley and Connor was as good as any of it.

Q. That is the Jennie Archilla land. Do you know anything about this Floyd B. Payne land, the forty immediately west of the Jennie Archilla? A. Not a great deal; I have been over the property.

Q. Is that equally as good as the Jennie Archilla? A. Well, nearly so, I should judge.

Q. How long did you say you have been operating in this
131 field? A. September; last September.

Q. September, 1908? A. Yes sir.

Q. You were not operating out there, then, when the first wells were drilled in on the Jennie Archilla property, were you? A. Why, I came down shortly after that well was drilled in.

Q. Who had charge of it the month before you came there? A. Fellow by the name of Frank Schaffer.

Q. Then your testimony as to the original production of these wells is not from personal knowledge, is it? A. Well, it would be with the exception of the one well, and I have seen his grade reports on that.

Q. How many wells have you personally brought in on the Jennie Archilla land, or superintended bringing in? A. Well, all of them except the first two.

Q. What is the capacity of the largest well that has been brought in by you out there?

Mr. ZEVELY: Make it a little more specific.

Q. At the time of bringing it in, the initial production? A. Well, five hundred barrels.

Q. And what has been the smallest?

Mr. ZEVELY: If you pardon me, I think the witness is not accurate about that; I would like to refresh his memory.
132 Mr. Cook: Well, he is testifying practically from his memory as to the other facts.

A. Well, it was in the neighborhood of that.

Q. In the neighborhood of that? A. Yes sir.

Q. Five hundred.

Redirect examination.

By Mr. ZEVELY:

Q. Mr. Martin, you say you gauged these wells every day; do you mean by that that you gauge each well separately every day? A. No sir.

Q. How do you make that gauge? A. We just average them up.

Q. Now, what becomes of the oil produced by these wells daily? A. With which?

Q. What becomes of the oil of each day—— A. Goes to the tank.

Q. Does it all go to the same tank? A. No, not all of it.

Q. Several wells go to—how many sets of tanks have you on the Jennie Archilla? A. We have three.

Q. Three sets? A. Yes sir.

Q. All the oil from all the wells on the Jennie Archilla go into those three tanks? A. Yes sir.

Q. And you don't gauge these wells separately? A. No sir.

Q. But estimate the total production from the three tanks?
133 A. Yes sir.

Q. And make the estimate as to what each well is doing.
A. Yes sir.

Recross-examination.

By Mr. Cook:

Q. What is the capacity of these three wells that the oil from the Jennie Archilla allotment is placed in—these tanks? A. What is which?

Q. The capacity of these three tanks.

Mr. ZEVELY: Three sets of tanks; clusters of tanks.

Q. What is the capacity of the tanks? A. Battery one and two is two-sixteen hundred barrel tanks, in battery one and two.

Q. That is 64 hundred barrels in all. A. Battery No. 3 has two 250 tanks.

Q. That is five hundred; that is all? A. Yes sir. That is, except just flow tanks, that the wells flow into.

Q. How much oil have you in those tanks at the present time? A. Well, I can't say until I gauged them.

Q. How much of the oil production from this Jennie Archilla land is taken by the pipe line? A. Well, I would have to
134 go back and figure that, look it up.

Q. Don't you know what per cent. of the oil they take from you? A. They are supposed to take about thirty per cent.

Q. Well, do they take any more than 30%? A. Well I don't know as they do.

Q. You don't know that they don't, either, do you? A. Well, no, I don't because that is up to them.

Q. Have you any idea, Mr. Martin, as to the total production of the four wells lying two hundred feet north of the Eva Waters land, which we have been talking about?

Mr. ZEVELY: We object to that question for the reason that he has testified to it at least half a dozen times.

Q. Answer the question subject to the objection. A. You mean the four wells on the line?

Q. No the four wells originally drilled in there, last of August and September, the total production since they were originally brought in.

Mr. ZEVELY: Oh, I didn't understand that question.

A. What they produced since they were brought in?

Q. Yes sir. A. Oh no.

Q. I just asked you if you have any idea. A. No, I haven't.

W. A. MARTIN.

135 P. J. WHITE, first being duly sworn, upon his oath, deposes and says as follows:

On direct examination.

By Mr. ZEVELY:

Q. State your name and occupation and residence, Mr. White. A. P. J. White; supply business and also the oil business, and reside in Tulsa, Oklahoma.

Q. How long have you been engaged in the supply business—oil well supplies? A. Yes sir. Twenty years.

Q. Twenty years in the oil well supply business? A. Yes sir.

Q. And how long in the production business, production of oil? A. Well, I should judge six or seven years; six years.

Q. Mr. White you are one of the lessees, together with others of

the Herman Knight, in the thirty acres of land here in controversy, which has already been described, are you not? A. I am.

Q. Mr. White, did anybody—first, who are your associates? A. Why, Thomas White, in the thirty.

Q. In the thirty? A. At the time the lease was taken, Thomas White and W. T. Lewis.

Q. W. T. Lewis? A. Yes sir.

Q. What persons were interested with you in this thirty acres in March and April of this year? A. Well, Mr. W. F. St. Clair, Thomas White, and myself.

Q. Who, if any of you owners of this lease, negotiated with Charles Water, the guardian of Eva Water, looking to a compromise of the contest case? A. I did.

Q. Which was then pending between Herman Knight and the minor, Eva Waters? A. I did.

Q. Did anybody else—did either of the other two associates or any agents have anything whatever to do with the negotiations? A. No sir.

Q. Then whatever negotiations were had with Charles Waters and whatever representations were made to Charles Waters—they were made by you? A. Yes sir.

Q. And if anybody else made any representations of any character, touching this compromise to Charles Waters, it was made without the authority of you and your associates? A. It was, yes sir.

Q. In your negotiation with Mr. Waters, what did you represent to him as the production of wells in the immediate vicinity and surrounding the Herman Knight thirty, with the purpose of fixing in his mind a value for the thirty acres in consideration of which his child would withdraw her filing on that thirty acres? A. Well, I made no representations with the end in view that it would fix the value; I wanted him to make a price to us; we wanted to buy it, but he did ask me the question what the wells were doing, and I told him the wells on the north line, the corner well we call number one, was doing about one hundred and twenty-five barrels, in my opinion.

137 Q. That was in April? A. That was, I think, in April, and the others were doing less than that; the lowest, I think I represented, was doing seventy-five barrels; that was on the ten acre piece, east from the one hundred and twenty-five; about seventy-five. I got it a little too high.

Q. Your view now is that your estimate you gave him of the production of the surrounding wells was greater than the production as it was? A. As it was, yes sir.

Q. You didn't make any representations whatever to Mr. Waters, then, with reference to the value of his—— A. Oh no; I desired him to put a price on it.

Q. That came from him and not from you. A. Well, of course, I opened the negotiation to ascertain what he would do.

Q. Mr. White, we gave notice as you know that we would offer the testimony at this time, or at this place of J. I. Gillespie, David

Connolly, William M. Mosier, E. I. Perry, H. P. Anderson, and Thomas Cates. Do you know where Mr. Gillespie is? A. He is on a vacation.

Q. How long has he been there? A. I should judge six or eight weeks.

Q. Been away six or eight weeks? A. Yes sir.

Q. Do you know where he is? A. I understood one of the Gillespies—which one?

Q. J. I.? A. I understand he is in Colorado.

Q. Mr. Connolly was here. Do you know anything about Mr. Mosier? A. He is on a vacation.

138 Mr. Cook: I object to that line of testimony, unless it is shown for what purpose——

Mr. ZEVELY: The purpose is this: On cross-examination the witnesses here yesterday—you gentlemen took occasion to enquire of practically every one of them whether they had been here since June. We finally concluded the purpose was to show that when we had been making representations to the Department and the courts, that we were misleading them as to the facts, that we were not able to get our witnesses, and we simply desired to show that we subpoenaed this multitude of witnesses, most of whom were away, and that we were acting in the best of good faith, and in no effort to deceive the court about that.

Q. Now, you can state about Mr. Mosier. A. He is on a vacation.

Q. How long has he been gone, do you know? A. I should judge he has been away about eight weeks.

Q. Do you know where he is? A. It is reported he is in the northwest, wandering around the country.

Q. Seattle and other places? A. Seattle and other places; I think he went on an excursion.

Q. Mr. H. P. Anderson was subpoenaed here. A. He is on a vacation.

Q. We changed the notice, rather gave additional notice that we would have his testimony taken at Washington; why was
139 that? A. Because he was on a vacation in Vermont, nearer Washington than to this place.

Q. Now, in a further notice, Mr. White, we inserted the names of T. O. Cremin, W. A. Martin, J. W. Sloan, E. F. Blaze, J. O. Mitchell, C. S. Avery, Thomas White, P. J. White. Do you know anything of the whereabouts of Mr. Cremen? A. Well, he is on a vacation; he is in Ohio, I understand.

Q. Wasn't possible for us to have him here? A. No sir.

Q. Know anything about Mr. Sloan? A. Why Mr. Sloan has been on a vacation for, I should judge, three or four weeks, but I understand he is in the city now. Just returned a few days since.

Q. What about Mr. E. F. Blaze? A. He is on a vacation; he is up at Macanac Island.

Q. What about C. F. Avery? A. He is on a vacation.

Q. Know where he is? A. It is reported that he is somewhere in Missouri.

Cross-examination.

By Mr. Cook:

Q. Mr. White, when did you first become interested in the Eva Waters allotment? A. Well, I think about a year ago, a little over a year ago.

Q. Thomas White your brother? A. Yes sir.

140 Q. You say you conducted all the negotiations relative to the purchase of this land personally with Charles Waters, the father and guardian of Eva Waters? A. Yes, I negotiated the business for ourselves.

Q. When did you first see Mr. Waters relative to this matter? A. Well, I think in April last; I think it was in April, might have been in March.

Q. You say that these parties—Mr. Gillespie, Anderson, and others, are away on their vacations? A. The parties I mentioned are on their vacation.

Q. When did Mr. Mosier go away? A. It is my understanding, and I believe I read it from the papers, he went on the Elks Excursion, which left here for Los Angeles, I think, it was the 5th of July.

Q. When did Mr. Gillespie go away? A. Well, Mr. Gillespie—which Mr. Gillespie do you refer to?

Q. Jesse? A. Jess Gillespie—well, I should judge probably the middle of July; that is a fact—I know that he was going away from here, because I had some business negotiations with him and they were suspended until his return. That is, through a third party.

Q. Know of your own knowledge that he went away the middle of July, Mr. White? A. About that time.

Q. When did Mr. Anderson go away? A. Well I can't say when Mr. Anderson went, but he has been gone, I should judge, at least two months. That would bring it early in July.

Q. When did Mr. Cremen go away? A. Mr. Cremen
141 went right recently.

Q. How long ago? A. I should judge about a week ago.

Q. That would be since the middle of August. A. I think it is really more recent than the middle of August. Middle of August would be about a——

Q. When did Mr. Blase go away? A. Well, Mr. Blase has been away twice; once in July and again this month, both times to Macinac Island, taking his vacation, I guess he was recalled here for some reason. His wife has been up there, I understand.

Q. When did he go back? A. Well, I think he was back here in fact I know he was here the latter part of August, the latter part of July.

Q. How long was he here then, do you know? A. I should judge he was here a couple of weeks.

Q. Went away then about the middle of August again? A. Now, I can't say just when he went away.

Q. When did Mr. Mitchell go away? A. Well I can't answer that question; I will say that Mr. Mitchell was away, and I think he left here early in August, I believe.

Q. What about Mr. Avery? Did you testify as to Mr. Avery being away? A. I can testify. Haven't seen or talked to Mr. Avery for at least six weeks; I don't meet him very frequently.

Q. Are you in any way interested in the land in this controversy, known as the Twist-Waters 20 acres? A. No sir.

142 Q. Only in the Knight-Waters thirty acres? A. Yes sir.

Q. You signed this petition in this mandamus proceeding, Mr. White, as attorney in fact, didn't you? A. No sir.

Q. Do you know who the original complaint in this proceeding was filed by, the petition for mandamus? A. Herman Knight.

Q. The original? A. Thomas White filed the first original complaint, under power of attorney from Herman Knight.

Q. And as your attorney Mr. Zevely stated, the records will show the amended complaint signed by Mr. Knight himself. A. So Mr. Zevely states.

Mr. ZEVELY: Mr. Notary, I desire to move to strike all the testimony elicited on cross-examination touching subjects which were not brought out on the direct-examination in chief.

Q. Mr. White have you done any work towards operating this Eva Waters land?

Mr. ZEVELY: Now I desire to object to the question for the reason that it does not touch a subject which was brought out in the direct-examination of Mr. White, and that therefore it is incompetent for the counsel to ask the question, and I shall ask the Notary to rule on that proposition.

Mr. COOK: Mr. Zevely, you don't mean to say the Notary can rule out a question in a proceeding of this kind?

143 Mr. ZEVELY: I can ask him to do it.

The NOTARY: As the Notary understands the law, he has no authority to rule upon any objection made by counsel in the taking of a deposition, but he is willing to hear any authority submitted upon the proposition, because he may be mistaken.

Mr. ZEVELY: I will not offer any authorities. You can pass on it.

Q. All right, Mr. White. For the purposes of oil development? A. We have.

Q. Please state what that work consists in? A. We first—the first work was the drilling of a well under a conditionally approved departmental lease, approved by the Secretary of the Interior, Mr. Garfield. Approved conditionally. The next work was at the time that the case—sometime after May 10th, after the case—after he approved—after Pierce approved this confession of judgment.

Mr. SMITH: May 10th, 1909, you mean?

A. Yes, May 10th. When he approved the confession of judgment our attorneys wired us the matter was settled and he also told

us the conditions, told us the amount of money to pay, and told us the time when it was necessary to have it there, which was the 15th, and told us to see to the operations.

Q. And what did you do relative to improving — developing of that land? A. Well, we started drilling two wells; erected
144 rigs and drilled one well to the depth of four hundred feet, about; approximately four hundred feet.

Q. When did you do that, Mr. White? A. I can't give you the date.

Q. Well, about it? A. Well, it was sometime, I think either the latter part of May or early in June.

Q. What year? A. 1909.

Q. What part of this Eva Waters allotment was that drilling done on? A. On the part of it which was claimed by Herman Knight. Of course we started this work—understand, by drilling I mean the actual drilling of wells; beginning of the operations construction, etc., that was proceeded with sometime previous; I don't remember what time.

Q. Know what part of that thirty acres of the Herman Knight land that was? A. On the northeast ten.

Q. Have you got any other improvements out on that land, Mr. White? A. Yes, we have a house on it.

Q. What kind of a house? A. Well, it is not a very substantial affair, however. It is a house we built there for the protection of a man living there and also a tent. Couple of tents.

Q. When were they put there? A. Well, I believe we built the house sometime in June.

Q. This year? A. Yes sir.

Q. What part? A. Well, I think about the middle of June.

Q. Didn't you drill this well about that time, too? A.
145 I think that we built the house and that we had suspended drilling, and then about the time we erected the house. In fact, I am sure of that.

Q. Did you commence drilling of this well in May or in June? A. Now, I can't answer that definitely. I am not in charge out there. While I am interested in the property, I don't go out there very frequently, probably once a month.

Q. When did you authorize the drilling of that land, Mr. White? A. Well, a short time after we received this decision; received this notice.

Q. Notice of what? A. Notice that Secretary Pierce had approved this confession of judgment.

Q. Was it after the 21st of May? A. Well, I am not positive as to the—I can't say, I am not competent to testify on that particular point as to the time.

Q. You have a family in that house out there, have you not, Mr. White? A. Well, I can't say; there is a person there; I can't say whether there is a family or not; there is a man there.

Q. What is that man's duties? A. Well, his duty is to protect our interest and I think he is also been employed on the adjoining property; roust-about and general laborer.

Q. Did you do any work relative to the drilling that was done

immediately north of this land on the Jennie Archilla land? A. I didn't quite catch that question.

146 Q. Did this man living on this land now, do any work on the—in connection with the drilling or building derricks on these three wells immediately north? A. I don't know. See I have nothing whatever to do with the man. We have a manager; one of my partners in interest is manager of the property, and I am employed in the supply business; don't pay much attention to the oil business.

Q. That man put out there for the purpose of holding possession of this property?

Mr. SMITH: We object to that because it is irrelevant, immaterial, incompetent, and does not tend to prove any issue in this case.

A. The man was put out there not to protect this property only but adjoining property, and look after our general interest in that part of the field.

Q. Have you issued any instructions to this man relative to keeping anybody off of this land? A. Have I?

Q. Yes. A. No sir.

Q. Has anybody in connection with your company? A. I don't know.

Q. Was this man put out there for that purpose, Mr. White? A. I would say that he was placed there for the purpose of protecting the property against fire or trespassers or anything else. I presume that would be his duty.

Q. Did you ever authorize Thomas Cates to go to see Charles Waters in your behalf relative to having Waters sell this property to you? A. No sir.

147 Q. If Cates testified to that effect yesterday, is he mistaken?

Mr. SMITH: I object to that because it is not the duty of a witness to testify and pass upon the testimony of other witnesses; he can give his statement and the other man gives his statement, and the court will judge as to who is mistaken.

A. Mr. Cates came to me personally to investigate the value of this property, in order to qualify himself to make recommendations of its sale to Charles Waters; recommendation of the sale to ourselves.

Q. Did you call Cates up over the telephone asking him to come down here with that idea in view? A. No. However, I talked with Cates over the phone; I will explain that.

Mr. ZEVELY: I intended to interpose an objection, because of the uncertainty of the question. Not definite enough as to time, place, or anything else to elicit an answer from the witness. Let him make the question more definite.

Q. Did you at any time call up Mr. Cates over the telephone and talk to him relative to this matter? A. I talked with Mr. Cates over the telephone in relation to a trip to Tulsa, from Lenapah, to Tulsa, which I supposed he was going to make; I would much pre-

fer to explain this particular point. There is nothing particular to cover up. Mr. Waters told me that he had a friend named Tom

Cates at Lenapah, and he suggested that I see Mr. Cates in
148 regard to this matter, and I told him I didn't know Mr.

Cates, and didn't care to go to Lenapah; that if he wanted to settle the matter and dispose of his piece of the property, he could see Mr. Cates, if he choose and have Mr. Cates see me, and he said then he would call Mr. Cates and have Mr. Cates come to Tulsa and meet me, and go over this property. That was on a Saturday. I arrived home here on Sunday. Sunday afternoon I found that I would have to—I was supposed to leave the city the following day, in regard to my supply duties—I travel a good deal from branch store to branch store under my charge—and I thought it would be advisable to find out just when Mr. Cates was coming here, or if he intended to come at all, so I called him over the phone and asked him if Mr. Waters talked to him in regard to coming here, and he said he had, and I asked him when he was coming and he said I can come any time, not particular. And I said I would like to go away from here, and like to get the thing off my hands, and I said if convenient why not come over tonight, Sunday, night; we can go out there Monday and dispose of the matter, and then I will be at liberty. He said he would do that, and he came to Tulsa, I think Sunday night on the nine o'clock train, and the phone conversation referred only to the time *which* he expected to come here.

Q. Do you know whether or not Mr. Cates went out on this Eva Waters land after he arrived at Tulsa? A. He did.

Q. Did you accompany him? A. He was in my company. yes.

Q. Did you tell him anything relative to the production
149 of any wells surrounding this land? A. Well, he asked me questions in regard to the production of the wells around the land and in fact of the whole property, and he stated that the wells were practically the same kind of wells that he had on his property; he had a great many wells to come in quite large, three or four or five hundred barrels, and depreciated of course in production rather declined in production, and he seemed to be very familiar with oil properties in general, and I was somewhat surprised to learn that he had been so fortunate in getting these wells on his own property, and he asked me as to the production of the wells along the line, and I told him what they were doing, approximately.

Q. Did you tell him the production of the wells on all sides of this land, Mr. White? A. Oh yes, he made a plat. Made a little plat on a piece of paper there, and questioned me very closely, not only as to the production but as to the general characteristics of the field. Seemed to be qualified probably more so than I was to pass on——

Q. What, if you recollect Mr. White, did you tell Mr. Cates as to the general production of the wells in the vicinity of this land? A. Well, I indicated each well by pointing to them, stood at a

high place on the Herman Knight—point there and I pointed to each well, and told him approximately the production.

Q. What did you tell him the production, if you recall? A. I told him the Number One well was doing approximately one
150 hundred and twenty-five barrels, and I thought the other would average a hundred barrels.

Q. What do you refer to as No. 1 well? A. In the southwest corner of the Jennie Archilla.

Q. Lying two hundred feet from the line? A. Yes sir.

Q. After Cates had gone on this land with you and you had advised him as to the production, Mr. White, did you then authorize him to see Waters relative to having Waters sell this land to you?

A. No sir; I authorized him to do nothing. He came there for the express purpose to investigate this land for Waters. At any rate Waters told me that he would send him to me for that purpose, that is to Tulsa for that purpose, and he told me that he was here for that purpose.

Q. Was there anything said by you to Cates relative to what price he should tell Waters to sell this land for? A. We discussed the price, rather he wanted us to discuss it, and of course I took the position that it was Mr. Waters' land, and for that reason I invited the proposition from them, and I felt they should set the price on it.

Q. Did Waters make you any proposition? A. Yes, Waters made us a proposition; that is, subsequent to this visit here.

Q. Of Cates, subsequent to Cates' visit? A. Yes.

Q. Was your purpose in telling Cates the production of these wells given with an idea in view of having Waters place or having something to estimate a value of this land by? A. No sir; there was no
151 contract for the purchase of the land, and it was rather improbable that we would buy the land. Therefore my interest was not to place a value on it; it was simply to inform him.

Q. You defrayed Cates' expenses for that trip, did you not Mr. White? A. We did. I want to explain that. Might do it here. We defrayed Cates' expenses as a part of the consideration for this property. This agreement being made when we agreed to pay twelve thousand dollars for the property.

Q. Well, now, you testified just now, if I understood you correctly, that there had been no agreement for the purchase of this property, and that you didn't think there would likely be any. A. I referred to that particular time. I mentioned that this was subsequent to that time, after Mr. Cates had gone to Mr. Waters and made his report I presume, and had agreed to name us a price.

Q. Well, didn't you and Cates go immediately from here to Muskogee after you went upon this land, where you met Waters? A. Cates communicated with Waters, I think, the same day. I don't know what the nature of his communication was. He, I presume, told him to go to Muskogee. At any rate, Cates said we will go over there and see Waters, and we did. We went to Muskogee and Cates met Waters and sometime in the evening, not hearing from them, I went around to see if I could find them. I didn't

know where they were. And so I found them at the Katy Hotel.

152 Mr. Cates and Mr. Waters, and Mr. Cates—I asked him if they had come to any terms, on the matter, and he said well they had talked it over quite generally, and that Mr. Waters was willing enough to sell at the right price, but was somewhat fearful that his attorneys would retaliate and cause him trouble, so I talked with Waters then and he stated he had had some trouble at sometime in the Territory and that they had defended him.

Mr. ZEVELY: Did he mention the name of these attorneys?

A. Starr & Patton, and they had told him if he tried to relinquish this property that they would send him to the penitentiary.

Q. What sum did you pay to Cates for the expenses, Mr. White?

A. One hundred dollars. We paid that two or three days ago. I would say this: I would like to add, that we paid him—gave him a check for a hundred dollars, and that we expect some return from that. We were to pay his actual expenses whatever they might be. We agreed with Mr. Waters—Mr. Waters stipulated that. He said he was a poor man, and couldn't afford to do these things, so that we agreed to pay this man's expenses. He required us to pay it.

Q. Did you have all the witnesses subpoenaed that have been read here, by your attorneys as having been in the notice of the taking of the depositions? A. This present deposition?

Q. Yes. A. I was active in it.

153 Q. Do you know whether subpoenas issued for all of the parties or not? A. I don't know; I furnished the names to Mr. Zevely and Mr. Smith and Thomas White, my brother, looked after the subpoenas.

Q. Are you connected with any — the following oil companies Hiland Oil Company? A. No sir.

Q. Los Angeles-Cherokee Oil Company? A. No sir.

Q. Little Rock Oil Company? A. No sir.

Q. The Alpine? A. Yes sir.

Q. The Justin? A. Yes sir.

Q. To what extent are you interested in this Jennie Archilla allotment? A. What is my interest in it?

Q. Yes sir. A. One-quarter interest.

Q. Do you know how far wells are usually drilled apart, Mr. White? A. Well, there is no particular rule. I would say that under favorable conditions, rather normal conditions, the rule is I think down here to drill wells one hundred and fifty feet from the line.

Q. How far were these four wells you brought in last year north of this Waters? A. They were brought in two hundred feet from the line, owing to a provision in the Department lease requiring them to be placed exactly at that point; rather, exactly at that distance.

Q. You have been in the oil business sometime, have you not, Mr. White? A. Yes.

Q. Well, from your experience in the oil production, do you believe that the four wells you originally placed on this land were

154 sufficient to have drawn the oil within two hundred feet from each side of them? A. Well, I believe I would say that the wells probably in the course of two years might drain a couple of hundred feet yes. That is merely belief; I don't know anything about it, of course.

Q. What was the object of your company then, Mr. White, in drilling three wells inside of that two hundred feet—four wells inside that two hundred feet towards—— A. Why, it was to get all the oil that we possibly could out from under our land.

Q. Did you have any object in view relative to getting all you could out from under the Eva Waters land? A. Well, of course we didn't have an object of that kind in view. We drilled these wells on our own land on our own property. I might add this, that the Little Rock Oil Co. who owned the property adjoining the Knight farm, or this Waters allotment, came down on our line and drilled within fifty feet of it, that is, within fifty feet of the Waters line. The Hiland Oil Company, which is largely owned by Mr. McFarland, owned the property adjoining the William Twist land, and they had drilled within fifty feet of the line. We felt that if this controversy might be decided against us, that probably whoever acquired the land would come right up against our line, because it seemed to be the practice in that particular field. So we drilled those wells there with that feeling and of course you might say prompted by the drilling that had been done in that particular district by these people.

P. J. WHITE.

155 Mr. ZEVELY: Mr. Cook this map which I have offered was made last Monday. If you will admit that fact, I won't have to recall that witness to show that.

Mr. COOK: That is a map introduced as plaintiff's exhibit "A"?

Mr. ZEVELY: Yes, was made, as a matter of fact, last Monday, August 23rd.

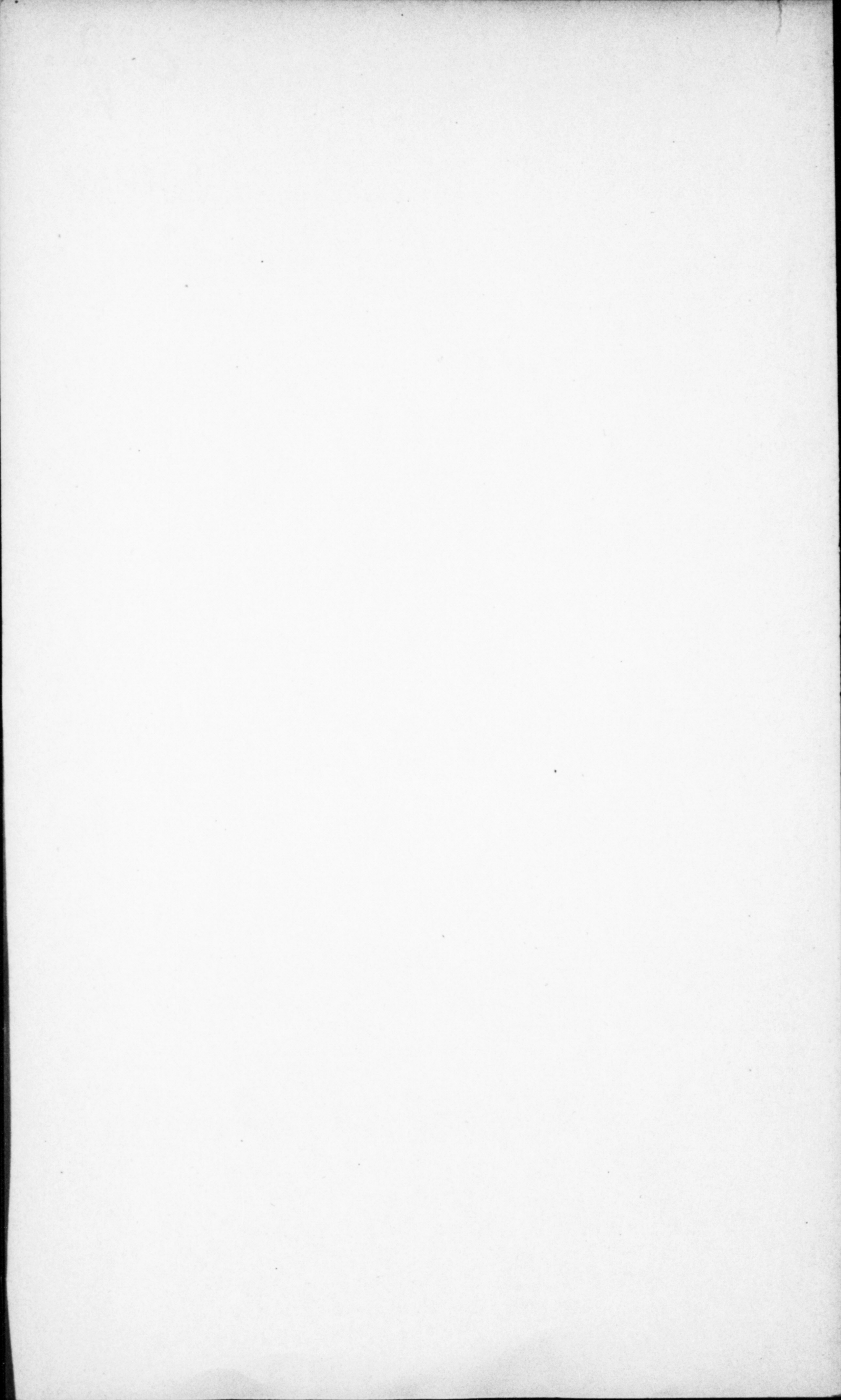
Mr. COOK: That is satisfactory.

Mr. ZEVELY: Just save bringing the witness back.

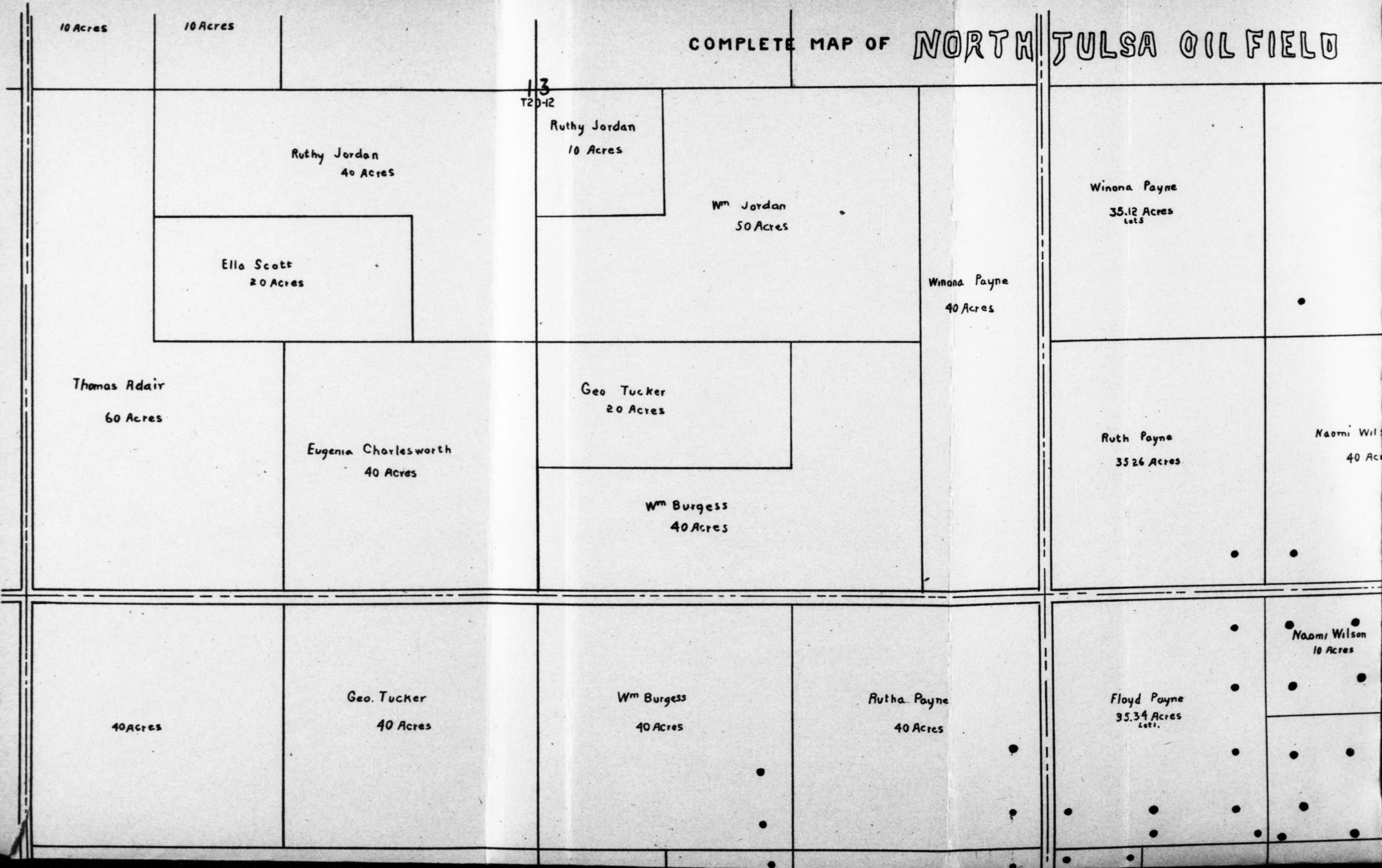
Mr. COOK: Yes sir.

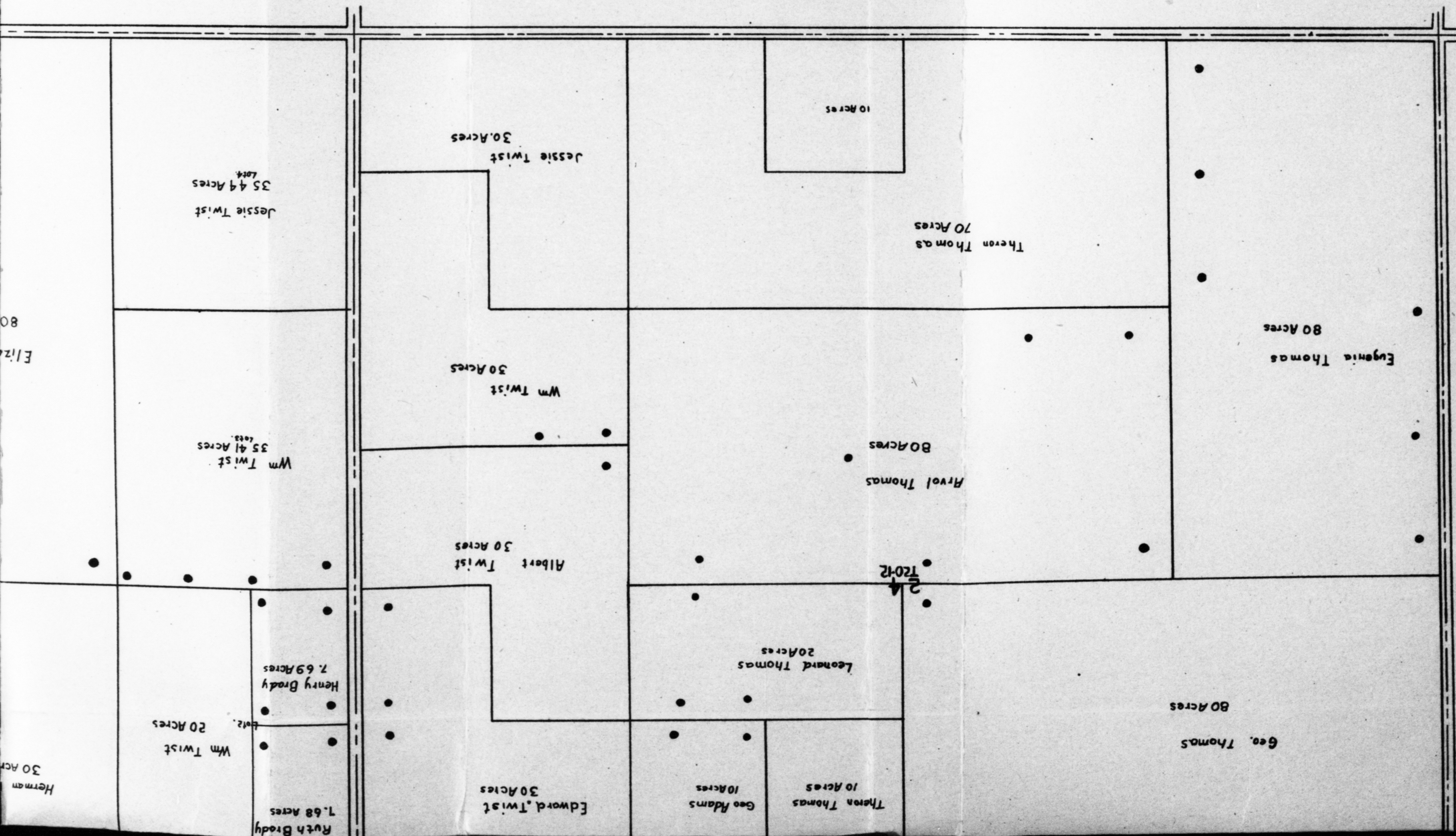
Mr. ZEVELY: That is all today.

(Here follows plat marked Plaintiff's Exhibit A, page 156.)



COMPLETE MAP OF NORTH TULSA OIL FIELD





COMPLETE MAP OF NORTH TULSA OIL FIELD

13
T2D-12

Ruthy Jordan
10 Acres

Wm Jordan
50 Acres

Winona Payne
40 Acres

Winona Payne
35.12 Acres
lots

Geo Tucker
20 Acres

Wm Burgess
40 Acres

Ruth Payne
35.26 Acres

Naomi Wil
40 Ac

Wm Burgess
40 Acres

Rutha Payne
40 Acres

Floyd Payne
35.34 Acres
lots

Naomi Wilson
10 Acres

Theron Thomas
10 Acres

Geo Adams
10 Acres

Edward Twist
30 Acres

Ruth Brady
7.68 Acres

Wm Twist
20 Acres
lots

Herman
30 Acr

Leonard Thomas
20 Acres

Henry Brady
7.69 Acres

Albert Twist
30 Acres

Arvel Thomas
80 Acres

Wm Twist
30 Acres

Wm Twist
35.41 Acres
lots

Eliza
80

10 Acres

Jessie Twist
30 Acres

Jessie Twist
35.44 Acres
lots

10 Acres

10 Acres

COMPLETE MAP OF N

13
T20-12

Ruthy Jordan
40 Acres

Ella Scott
20 Acres

Ruthy Jordan
10 Acres

Wm Jordan
50 Acres

Thomas Adair
60 Acres

Eugenia Charlesworth
40 Acres

Geo Tucker
20 Acres

Wm Burgess
40 Acres

40 Acres

Geo. Tucker
40 Acres

Wm Burgess
40 Acres

Rutha P...
40 Acres

Geo. Thomas
80 Acres

Theron Thomas
10 Acres

Geo Adams
10 Acres

Edward Twist
30 Acres

Leonard Thomas
20 Acres

Albert Twist
30 Acres

Eugenia Thomas
80 Acres

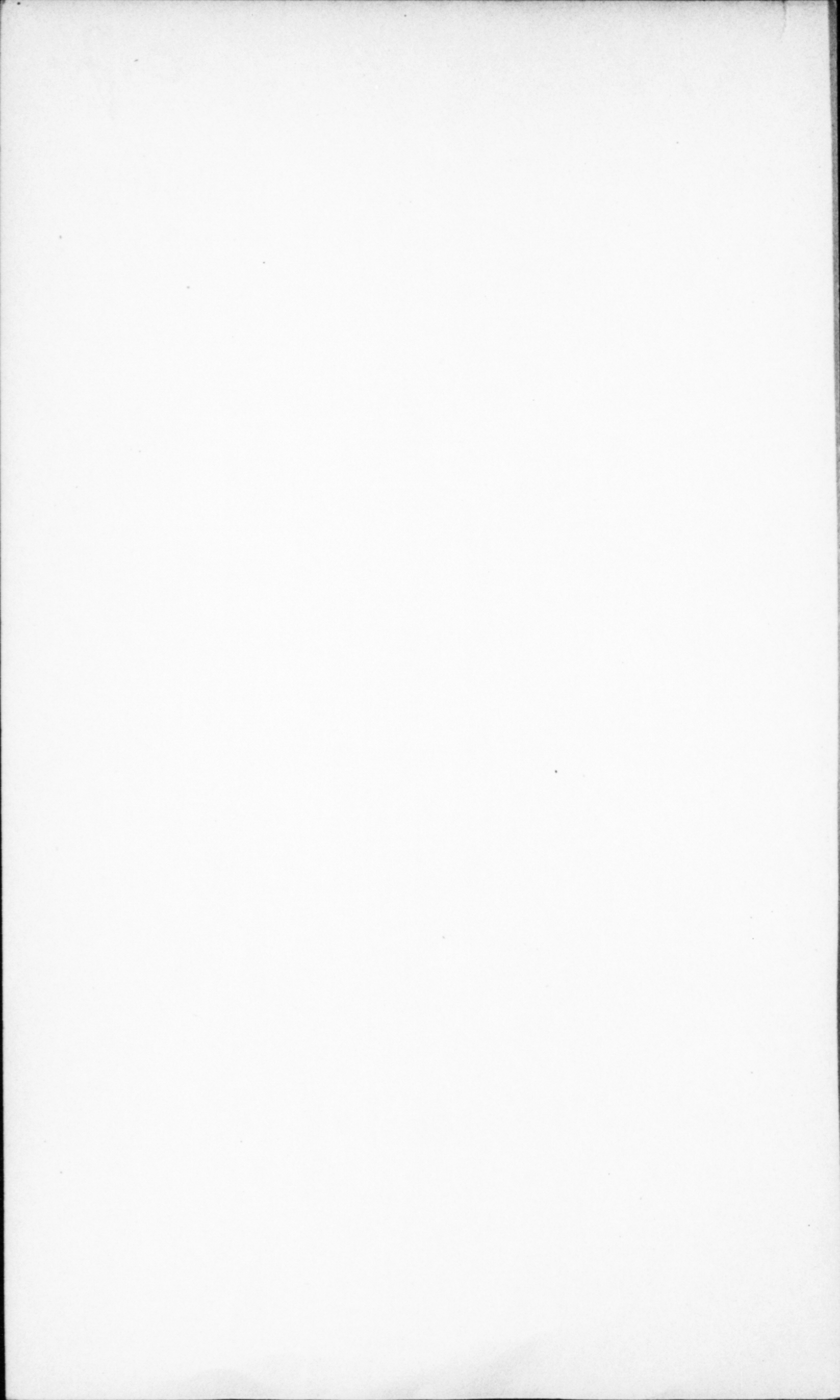
Arvel Thomas
80 Acres

Wm Twist
30 Acres

Theron Thomas
70 Acres

10 Acres

Jessie Twist
30 Acres



157

Filed September 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808. Mandamus.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

vs.

RICHARD A. BALLINGER, Secretary of the Interior,

and

At Law. No. 51809. Mandamus.

THE UNITED STATES OF AMERICA ex Rel. WILLIAM J. TWIST

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Stipulations.

It is hereby stipulated that the deposition of J. George Wright, taken at Muskogee, Oklahoma, on the 26th day of August, 1909, before Chester A. Cowper, Notary Public, may be read and considered with like force and effect as if the same had been signed by him.

This stipulation is made by reason of the fact that Mr. Wright had an appointment in St. Louis, Missouri, and was unable to remain in Muskogee for the purpose of signing his deposition and may not return before it is necessary to forward the deposition, and he stated that he was willing to have his testimony, taken and transcribed by the stenographer, read with like force and effect as if he had signed his deposition.

158

Witness our hands this 27th day of August, 1909.

ZEVELY. GIVENS & SMITH &
E. R. PERRY,

Attorneys for Relators.

J. CARTER COOK,

Attorney for Respondent.

* * * * *

It is hereby stipulated and agreed by Zevely, Givens and Smith, attorneys for the relators, and E. R. Perry, attorney for William J. Twist, and J. Carter Cook, attorney for the respondent, as follows:

The depositions of witnesses in behalf of the relators taken at Tulsa, Oklahoma, on the 24th and 25th of August, 1909, at Muskogee, Oklahoma, on August 26, 1909, and all subsequent depositions, shall be read in evidence subject to all objections, when read, to the same effect as if the witnesses were personally present and testifying, and the said depositions shall be read in evidence at the hearing of each of the causes pending in the Supreme Court of the District of Columbia and numbered 51,808, and 51,809, without ob-

jection as to notice, certification and return, and no motion to quash said depositions, or either of them, will be made by the respondent.

Witness our hands this 26th day of August, 1909.

ZEVELY, GIVENS & SMITH,
E. R. PERRY,

Attorneys for Relators.

J. CARTER COOK,

Attorney for Respondent.

* * * * *

159 STATE OF OKLAHOMA,
County of Muskogee, ss:

Be it known, that an examination of witnesses begun and held on the 26th day of August, A. D., 1909, when the depositions hereto attached were taken, I, Chester A. Cowper, a Notary Public in and for the state and county aforesaid, did cause to be personally present before me at the offices of Zevely, Givens and Smith, in Muskogee, Oklahoma, the following named witnesses, viz: J. George Wright, D. H. Bynum, and James M. Givens, to testify on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia, wherein the United States of America, on the relation of Herman Knight and William J. Twist, respectively, is relator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties that the testimony here taken shall apply to both causes Nos. 51,808 and 51,809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public.

Present on behalf of the relator, Messrs. Zevely, Givens and Smith, and Mr. E. R. Perry; and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said
160 cause, and thereupon the said witnesses deposed and said as follows:—

J. GEORGE WRIGHT, first being duly sworn, upon his oath, deposes and testifies as follows:

On direct examination.

By Mr. ZEVELY:

Q. State your name, please, and occupation and residence. A. J. George Wright; Muskogee, Oklahoma. Commissioner to the Five Civilized Tribes.

Q. How long have you been down here, Mr. Wright? A. Eleven or twelve years.

Q. How long have you been Commissioner to the Five Civilized Tribes? A. Two years.

Q. You were Commissioner in May, 1909? A. Yes sir.

Q. I will ask you whether or not you received on May 11th, 1909, or about that date, the following telegram from the Secretary of the Interior:

Mr. COOK: I think if the contents of this telegram is introduced,—the telegram is in existence, and it is the best evidence, and this copy is not; I object to it.

Mr. ZEVELY: I have not offered it at all; asked him if he received that telegram.

A. That telegram was not received by me; I was not here at the time.

161 Q. Was it received at your office, if you know? A. It was received at the office, yes sir.

Q. By whom? A. By Thomas Ryan, Acting Commissioner.

Q. Did you afterwards see this telegram? A. Yes sir.

Q. What was this—the last word but two prior to the signature of Mr. Pierce, Acting Secretary, reads “promised” here; what did your telegram read?

Mr. COOK: I object to the testimony from that copy, for the reason that there is considerable controversy as to the wording of that telegram—

Mr. ZEVELY: I didn't ask him what this read. I said what does your telegram read.

Q. Read the question. A. My recollection is that the original telegram was worded the same.

Q. Did you ever have any correction of that telegram? A. Not that I recollect.

Q. When you—how long after the receipt of this telegram did you get back to your office? This was on May 11th. A. June 18th.

Q. June 18th? A. Yes sir.

Q. What if any action had been taken by your office under this telegram? A. The record showed that the conditions in that telegram had been complied with.

Q. In what manner? A. By preparing and executing deeds referred to and sending them to the Department.

Q. Was the deed prepared by— A. The deeds—all
162 deeds are prepared—

Q. Was this deed prepared here, as directed in this telegram, and sent to the Chief to be signed? A. That is my understanding, but I have no personal knowledge.

Q. Your records show that? A. Yes sir.

Q. Do your records, if you know, show that such a step was taken with reference to any other tract of land or allotment in the Cherokee Nation, or other of the Five Tribes?

Mr. COOK: I object to that as irrelevant, incompetent, and immaterial, and has nothing to do with the issues in this mandamus proceeding. I further object to the testifying as to any records,

unless the records or certified copies are introduced, as they are the best evidence, and this testimony is not competent.

A. I can not say.

Q. As a matter of fact, Mr. Wright, in your experience as Commissioner, was the—was this situation ever there before—did anybody ever before have a deed signed under orders from Washington—from the Secretary?

Mr. COOK: I object to that, as it has no bearing on this particular case.

A. I don't recollect any instance.

Q. So far as your knowledge of the records is concerned, there is not an instance prior to this one? A. So far as my recollection is concerned.

163 Mr. COOK: I submit, again, that the records of the office are the best evidence.

Q. Did you ever receive these checks—this money called for by this telegram? A. Received at my office, yes sir.

Mr. COOK: I think, Mr. Zevely, it would be better to have a more definite question as to the checks.

Mr. ZEVELY: He was not there, and I want to show that he was not there. The telegram speaks for itself.

Q. Mr. Wright, do you know Mr. Serven? A. Yes sir.

Q. Do you know his initials? A. I don't think I know his initials.

Q. Do you know his occupation? A. I understand he is an attorney in Washington.

Q. Do you know the firm to which he belongs in Washington? A. I don't know the style of the firm; McGowan, Serven & Mohun, I think.

Q. At this inquiry—at the taking of this testimony at Tulsa yesterday and the day before, Mr. Serven has been present and active—participating, suggesting to counsel of record in this case; do you know whether or not he has any authority to represent the Secretary of the Interior in this suit?

Mr. COOK: One minute, Mr. Wright, please.

164 A. I saw a letter (Mr. Cook hands witness letter), addressed to Mr. D. H.—Dana H. Kelsey, dated August 20th, 1909, from——

Q. You are reading from that now, are you? A. Yes sir. From Lawlor, Assistant Attorney General of the Department of the Interior.

Q. Well, just read it into the record. A. Which is as follows——

Q. Yes, read it. A. Mr. Dana H. Kelsey, United States Indian Agent, Muskogee, Oklahoma. Dated at Washington, August 20th, 1909. Sir: This will be handed you by Mr. S. R. Serven, of the firm of McGowan, Serven & Mohun, attorney for the guardian of Eva Waters. Mr. Serven is familiar with all the facts involved in

the controversy between Knight and Twist and his client, and goes to Oklahoma for the purpose of offering such aid and assistance as such familiarity will render possible, in connection with the depositions shortly to be taken in the cases of Knight and Twist against the Secretary of the Interior. Mr. Serven will be glad to co-operate in any way, and you will therefore call upon him to whatever extent you deem proper. Very respectfully, Oscar Lawler, Assistant United States Attorney.

Q. Mr. Wright, I enquired of you—this telegram of May 11th, of which I presented you a copy. Can you bring that original telegram? A. Yes sir.

Q. Well, we would like to have that. Is this a correct copy? How does that word read at the bottom? A. The same.

Q. Let this be read into the record, Mr. Wright. A. The
165 telegram I have, which I here present is the original telegram; copy it in.

Mr. Cook: (Reading telegram presented by witness): Washington, D. C., May 11, 1909. Ryan Acting Commissioner, Muskogee, Oklahoma. Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of Twenty-five thousand dollars for use of miner Waters. Contestants given including 15th to make payment upon receipt of thirteen thousand more within time allowed. Forward entire twenty-five thousand to department, endorsed to Secretary, when entire funds received by you. Prepare deeds to respective contestants, and have them executed and forwarded here for approval. Report promised by wire. Signed Frank Pierce, First Assistant Secretary. Eleven thirty-five a. m., over the Western Union Telegraph wire.

Mr. SMITH: Mr. Cook, let's stipulate that which is read in is taken in lieu of the original, so that we won't have to remove the original from the files.

Mr. Cook: It is hereby agreed between counsel that the telegram above read into the record is done—was for the purpose of not taking the original away from the files of the office of the Commissioner to the Five Civilized Tribes, and that said telegram as read shall have the same force and effect as the original; is a true copy and shall have the same force and effect as though the original were introduced.

166 Q. Mr. Wright, do the records of your office show whether or not the firm of McGowan, Serven & Mohun, at Washington, were attorneys, or are attorneys for the Olympus Oil Company, and asserted that they were attorneys for Charles Waters, as guardian of Eva Water, a minor, in two contest cases pending either in your office or at one of the offices in Washington, known as Charles Waters, guardian of Eva Waters, minor, against William J. Twist and Herman Knight?

Mr. Cook: Object to that question as incompetent, irrelevant, and immaterial, and as not bearing on the issues of this proceeding.

A. I cannot say without an examination of the records; my recollection is that the records would not show that, but I am not positive.

Mr. SMITH:

Q. Mr. Wright you were asked about what the record showed with reference to whether or not there was any other instance as to a deed having been ordered, previous to the issuance of certificate of allotment, and under the direction of the Secretary of the Interior. Now, without reference to the records, I want to ask you if, since you have been Commissioner, there has within your knowledge, ever been a deed issued in that way—I mean executed by the Chief in that way.

Mr. COOK: Objected to for the reason that it has no bearing on this particular case.

167 Q. Go ahead and answer. A. I do not recollect any, but this time.

Q. Mr. Wright the matter of permitting a relinquishment is a usual practice in your Department is it not? A. Yes sir; each case is considered for itself.

Q. There have been many instances of withdrawal of application by one party or the other, in contest cases, have there not? A. Yes sir.

On cross-examination.

By Mr. COOK:

Q. Mr. Wright is it as common a custom to permit minors to relinquish or confess judgment in contest cases as it is adults? A. Not as a rule, no sir.

Q. Mr. Wright have you seen this deed that you have been questioned about, of which the relator in this mandamus proceeding alleged was executed by the Secretary? A. No sir.

Q. Do you know of your own personal knowledge whether or not the Secretary ever approved that deed? A. No sir.

Q. Have you ever seen that deed, Mr. Wright? A. No sir.

Q. Mr. Wright were you present on or about the 25th day of May, 1909, in Washington City, during a conversation had between the Secretary of the Interior and Mr. E. R. Perry, of Tulsa, relative to the people whom Mr. Perry represented taking possession and drilling this Eva Waters allotment for oil? A. I was there——

168 Mr. SMITH: Just a moment. We object to the question for the reason that it is not proper cross-examination, and unless counsel upon the other side desire to make Mr. Wright their witness, this testimony could, of course, have no place here.

Mr. COOK: On behalf of the respondent, I contend that the question is wholly relevant, by reason of the fact that their own witness, Mr. Perry, testified at a former proceeding in Tulsa—at a former hearing in this proceeding, at Tulsa, to the fact that Mr. Wright heard such conversation by Acting Secretary Pierce, giving to Mr. Perry——

Mr. SMITH: The rule is as to any witness on the stand you can only cross-examine upon subjects asked that witness. This witness has been asked to testify to no such conversation. It cannot be

proper subject for this record, unless the witness is made the witness of the respondent.

Mr. Cook: Respondent joins issue on the proposition, and asks that the question be answered.

A. I was present at a number of conversations with the Secretary at the hearing there; what particular directions the Acting Secretary gave or instructions or authority to Mr. Perry, or others, I do not now recollect.

Q. Mr. Wright, do you know Alexander Hamilton? A. Yes sir.

Q. Did he ever work under you? A. Yes sir.

Q. What was his official position? A. Oil Inspector.

169 Q. Did Hamilton ever make a report to you on or about April 17th, relative to the oil production of wells contiguous to the Eva Waters allotment? A. Yes sir.

Q. Mr. Wright, will you look at this report and see if that is the report that was made to you by Mr. Hamilton, in an official capacity? A. Yes sir.

Mr. Cook: I am going to offer to have it read in the record.

Mr. Smith: We object to the offer for the reason that we have not interrogated this witness upon that subject, and it is not proper cross-examination, and it is clearly evidence in behalf of the respondent. Now, if counsel desires to offer it as such, we will not object to the fact that they gave us no notice of this testimony at all.

Mr. Cook: Counsel for respondents ask — it be read into the record, subject to the objection of relator's attorney.

Mr. Cook (reading from paper):

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE, UNION AGENCY,
MUSKOGEE, OKLAHOMA, *April 17, 1909.*

Honorable J. George Wright, Commissioner to the Five Civilized Tribes, Muskogee, Oklahoma.

170 SIR: Receipt is acknowledged of your letter of April 14th, 1909, wherein you request that an investigation be made of the land hereinafter described relative to the capacity of wells on the adjoining lands; the probable amount of drainage caused by same; the injury the land has suffered as a gas and oil mining proposition by reason of this, and the probable injury of same within the next six or eight months; also the present monetary value, and the value of one-eighth royalty interest of an oil and gas mining lease on the property. I have the honor to report that I have visited the premises and find that there are sixteen producing wells on lands adjacent to this property, with the daily capacity as follows:

Four wells, fifty feet from the west line of the property in question, with a daily capacity of three hundred barrels each. Two of these wells are on the allotment of Ruth T. Brady, and two on the allotment of Henry T. Brady. Both of these Brady leases were removed from Departmental supervision by order of court of Rogers County, on November 9, 1908, and are under operation by the Island Oil Company. These wells were brought in about four

months ago. One well adjacent to the southwest corner of the property, being on the allotment of William G. Twist, leased by the Los Angeles-Cherokee Oil Company. This lease was removed from Departmental supervision on March 2, 1909, by filing of bond running to lessor. This well is located one hundred and fifty feet from the line, and has a capacity of two hundred barrels per day.

171 One well, of the capacity of two hundred barrels per day on the south twenty-five feet from the line, is also located on the allotment of William G. Twist. One well of a daily capacity of twenty-five barrels per day, one hundred and fifty feet from the line, located on the allotment of Eliza J. Lloyd, leased to the Los Angeles-Cherokee Oil Company, which is still under departmental supervision.

Two wells of the capacity of one hundred and fifty barrels per day each, practically on the east line, situated on the allotment of Carrie M. Keys, leased to the Little Rock Oil Company; canceled by agreement January 6, 1909. These wells were brought in about two months ago.

Three wells, one hundred and fifty feet from the north line, of a capacity of two hundred barrels per day each, located on the allotment of Jennie Archilla, leased to the Alpine Oil Company, still under Departmental supervision.

Two wells, one hundred and fifty feet from the north line, of a daily capacity of two hundred barrels each, located on the allotment of Floyd B. Payne; no lease appears on record here.

Two wells, one hundred and fifty barrels capacity each, fifty feet from south line, on the allotment of Albert J. Lloyd, leased to Justin Oil Company, but said lease disapproved by lessor and lessee, on November 27, 1908. These wells have produced up to the present time, approximately 337,050 barrels, five per cent. of which
172 in my judgment has been taken from the property in question, amounting to 18,352.50 barrels; this at .41 per barrel will be \$7,524.53. This shows the amount that the property has been damaged by drainage and in my judgment should the present conditions continue during the next six or eight months, the damage will at least be five thousand more, making a total of \$12,524.53. The present monetary value of the entire property, from the best evidence obtainable, is thirty thousand dollars.

Figuring on a basis of four hundred barrels per day, the cash value of one-eighth royalty on this basis of settled production, which in my judgment, is certain, would be worth three hundred dollars per barrel, or fifteen thousand dollars.

In explanation of the way in which I arrive at these conclusions, will state that I assume the property at a settled production of four hundred barrels per day. This has a market value of two hundred dollars per barrel, which would show the property, when in this condition, to have the value of eighty thousand dollars. From this deduct the expenses of drilling, about fifteen wells, which will be about fifty thousand dollars, leaving a balance of thirty thousand dollars for the property in its present condition.

I find the damage to the east thirty acres, towit, the N. 2 of the

N. W. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4 of the N. E. 4, has not suffered proportionately by drainage as great an
 173 extent as the west 20 acres, and would consider that the east 30 acres has been damaged by drainage to the amount of about four thousand dollars, and the west 20 acres has been damaged to the extent of three thousand, five hundred, twenty-four dollars, and fifty-three cents. As my information goes, the wells drilled on the land to the east are lighter than those to the west, but on account of the west 20 acres being more damaged by drainage, both portions of the property have about the same monetary value per acre. This shows the east 20 acres to be of the monetary value of \$18,000.00, and the west 20 acres, \$12,000.00, making a total of \$30,000.00.

In the matter of the cash value of royalties on the west 30 acres, they would be \$9,000.00 an acre; and on the west 20 acres, \$6,000.00. This is figured on the basis of 240 barrels settled daily production on the east 20 acres, and 160 barrels settled daily production on the west 20 acres, respectively.

(Signed)

ALEXANDER HAMILTON,
Oil Inspector.

Will you stipulate it can be considered the same as the original, the same as we did about the telegram, for the purpose of preserving the files of the Five Tribes office; that this letter be considered as the original?

Mr. SMITH: We move to strike the letter just read for the reason that it is not the best evidence, and for the further reason that Alexander Hamilton is in no way qualified to give opinions
 174 upon the various matters about which he has expressed an opinion, and because the statement does not come from anybody who has been sworn as a witness.

Mr. COOK: Will you stipulate that it will be considered the same as the original?

Mr. SMITH: Yes, I will stipulate that.

Mr. COOK: For the purpose of preserving the files of the Commissioner to the Five Civilized Tribes' office.

Q. Mr. Wright was Mr. Hamilton—you testified that Mr. Hamilton was an official Oil Inspector? A. Yes sir.

Q. And part of his duties were to examine oil wells and to ascertain their production? A. Yes sir.

Q. This letter that was just read into the record was it an official report of Mr. Hamilton to you, as his superior officer? A. Yes sir.

Q. And as such is a part of the records of the Commissioner to the Five Civilized Tribes' office? A. Yes sir.

Mr. SMITH: The objection is renewed that the witness has not shown to be qualified to testify—to make statements about that about which he is attempting to give an opinion.

Mr. SMITH: I desire to cross-examine the witness of the relator.

Mr. COOK: I object to the gentleman cross-examining his own witness; he may re-direct examine him.

175 Mr. SMITH:

Q. I will ask Mr. Wright, what was done by your office with the letter of Alexander Hamilton, of date April 17th, 1909, which has been read, as to whether it was transmitted to the Department. A. It was forwarded to the Secretary at Washington, with the other papers, and the record in the case.

Q. Do you know when it was transmitted? A. In April, I think.

Q. Sometime in April? A. I think; 1909.

Q. How was it transmitted, by mail? A. Yes sir.

Q. Do you happen to know of your own personal knowledge whether or not it was in the hands of the Assistant Acting Secretary of the Interior, Mr. Pierce, when he delivered the decision on this matter, May 10th, 1909? A. I cannot say of my own personal knowledge that it was before the Department.

Q. But it was mailed in April? A. It was sent up, yes sir; mailed with the record.

Q. It was with the record? A. Yes sir.

Q. And the other papers in the case? A. Yes sir.

By Mr. Cook:

Q. Mr. Wright, as a matter of personal knowledge, you do not know whether the Acting Secretary, Mr. Pierce, ever saw this report prior to May 10th, 1909? A. No sir, I do not.

176 D. H. BYNUM, first being duly sworn, upon his oath testified as follows:

On direct examination.

By Mr. SMITH:

Q. What is your name? A. D. H. Bynum; Chief Clerk to the Commissioner to the Five Civilized Tribes, Muskogee, Okla.

Q. Did you occupy that position on May 11th, 1909? A. I did.

Q. You have been in the room since the beginning of taking testimony here today, while Mr. Wright testified? A. I have.

Q. You heard the telegram read into the record? A. I did.

Q. What did you do, if you had anything to do with that matter, after the receipt of the telegram? A. To the best of my recollection, I directed one of the employees to proceed to Shiatook, the residence of the Cherokee Chief, to secure the execution of the two deeds for this land to Twist and Knight.

Q. Were those deeds prepared upon the usual and regular form of deeds or patents that were issued to Cherokee citizens? A. They were.

Q. At the office of Commissioner to the Five Civilized Tribes, at Muskogee. Any other but the one for these deeds? A. Not to that class of citizens.

177 Q. Were the deeds ever returned to you? A. They were.

Q. Had they been executed? A. They had.

Q. By whom? A. By the Principal Chief of the Cherokee Nation.

Q. His name? A. W. C. Rogers.

Q. Do you know, approximately, how many deeds have been issued to the Cherokee Indians? A. As a rough estimate, I would say probably a hundred thousand.

Q. Has there in your knowledge been an instance of the issuance of a deed to a Cherokee Indian in the administration of the affairs of that office of Commissioner to the Five Civilized Tribes, of a deed under the special direction of the Secretary of the Interior, as this was issued—an other instance of that kind? A. I have no recollection of a similar case.

Q. How long have you been with the Commission? A. About four years and a half.

Q. Do you remember whether these deeds were transmitted by your office to the office of the Secretary of the Interior at Washington? A. They were.

Q. Do you remember the date? A. No, I do not.

Q. Do you remember whether or not your office, or the office of the Commissioner, telegraphed the Secretary of the Interior on May 13th, 1909, with reference to what had been done in the matter of
178 carrying out the direction of the Secretary in his telegram of May 11th, which has been read into this record? A. To my best recollection, there was such a telegram sent.

Q. Was that telegram confirmed by a letter of May 15th, if you remember? A. To the best of my recollection, it was.

Q. Was the money paid which was mentioned in the telegram of May 11th, 1909? A. Certified checks were delivered to me and after endorsement by Commissioner Wright, the endorsee, they were transmitted to the Department.

Q. At the same time the deeds were transmitted? A. Yes.

Q. That, I believe, you said was on May 15th? A. On or about that date.

Q. Do you remember the date when you received the certified checks? A. Checks, aggregating \$12,000.00, were filed—were delivered to the office several days in advance of two other checks, aggregating \$13,000.00. The two checks aggregating \$13,000.00 were turned over to me at Tulsa, I think the day of the telegram.

Q. The 13th? A. To the Department, whatever that is.

Q. You may state your business in Tulsa that day. A. To the best of my recollection, I went to Tulsa to expedite the execution of the orders of the Department, with reference to the preparation of deeds and the forwarding of the sum of \$25,000.00.

179 Q. Then the four checks which you have mentioned aggregated the sum of \$25,000.00? A. They did.

Q. Now they were all in your hands on the day of the telegram and a couple of days before the letter—the telegram of the 13th and letter of the 15th? A. They were. I wish to make a correction in the record.

Q. Yes sir. A. My presence at Tulsa at that time was not with reference to these Twist-Waters or Knight-Waters cases, as I now remember, but to confer with the United States Attorney with reference to the prosecutions for timber depredations.

Q. You received the checks **however**, while you were in Tulsa?
A. Yes sir.

Q. You say they were certified checks—you mean they were certified by the bank? A. Cashier's checks, as I remember.

Q. There was no objection by the Department that it was not in form of legal tender currency? A. I cannot answer for the Department.

Q. There was none upon your part? A. None upon my part.

Q. Never heard that question raised by anybody? A. No sir.

Q. Mr. Bynum, permitting one of the parties to the contest in the contest department, to relinquish the application to file, is
180 the same thing as withdrawing by confession of judgment, isn't it? A. I should say the effect is the same.

Q. That is a common practice in the department is it not? A. Yes.

On cross-examination.

By Mr. Cook:

Q. Mr. Bynum, you testified to having received certified checks for \$25,000.00? A. I did.

Q. Whom were they received from? A. Mr. Zevely delivered two checks for \$12,000.00, one that I received from Tulsa was from a Mr. Anderson; the other from a Mr. White.

Q. What Anderson was that, do you remember? A. I don't know his first name.

Q. H. P. Anderson? A. H. P. Anderson.

Q. What was the amount of that check? A. They were two checks, one for eight thousand and one for five thousand dollars: which one Mr. Anderson gave me, I don't know, but I think it was for the eight thousand, as it was for the thirty acres.

Q. What White did you receive the other check from? A. I don't remember his initials.

Q. P. J. White or Thomas White? A. I can not say.

Q. Mr. Bynum, where are those certified checks for \$25,000.00?
A. I think they are in the safe of the Disbursing Agent
181 for the Commissioner to the Five Tribes.

Q. Have they been continuously in the custody of the Commission, since their receipt? A. They have not.

Q. Where were they when they were not in the custody of the Commissioner? A. They were transmitted to the Department; returned by the Department, with instructions to return them to the contestants, Twist and Knight, or their proper representatives, and accordingly they were sent by mail to the firm of Zevely, Givens & Smith, as attorneys, and both shortly afterwards returned to the office, stating that such firm refused to receive them.

Q. Mr. Bynum, you testified in your direct-examination to having two deeds executed by the Cherokee Chief, to whom were those deeds made? A. They were made to the contestants, Twist and Knight, respectively, for the lands involved in the contest proceeding.

Q. Mr. Bynum in your capacity of chief clerk to the Commis-

sioner to the Five Civilized Tribes, do you have anything to do with contest proceedings? A. I do.

Q. Are you familiar with the procedure affecting contests? A. I am.

Q. Mr. Bynum is it customary to relinquish and confess judgment in contest proceedings? A. Relinquishments and confessions of judgment by minors are not allowed as frequently as in the case of adults, and they are more closely examined.

182 Q. Is it customary in your office, Mr. Bynum to permit legal guardians of minors to relinquish or confess judgment on behalf of the minors, without an order of the probate court having jurisdiction over those minors, or has that contingency ever arisen in your experience with the Five Tribes? A. Yes, I recall, I think, one or two instances, and where one case the Commission denied I think the confession of judgment upon that ground.

Q. Because there wasn't an approval by the court? A. Because there was no authority for the guardian to take that step.

Q. Do you know whether or not Charles Waters, the father and legal guardian of Eva Waters—father and guardian, ever made application to relinquish and confess judgment for this land? A. He made two applications, to the best of my recollection.

Q. Did he have at either time an order from the court to permit him to take such steps? A. I think not at the time the applications were made——

Q. Did Waters ever present an order of the court at any time before these application- to relinquish had been disposed of, by the Department? A. No, I think not.

Mr. SMITH: The relators move to strike the last question and answer, for the reason that the question is immaterial and does not tend to prove any issue in this case, because Charles Waters
183 is the natural guardian, as distinguished from the legal guardian, had under the law the right to relinquish or confess judgment.

By Mr. SMITH:

Q. Mr. Bynum the natural guardian as distinguished from the legal guardian was always permitted by the department to relinquish or confess judgment, was he not? A. I should say so, yes.

Q. Mr. Bynum don't you know that Maudie Waters, the mother and natural guardian, made these relinquishments? A. To the best of my recollection, she did.

By Mr. COOK:

Q. Did you know at the time Maudie Waters, the natural guardian of this ward, made this application to relinquish that there was a legal guardian for this child A. It was not so discovered until after the first application had been filed.

Q. What was that first application, if you remember, Mr. Bynum? A. I think that was about a year ago.

Mr. PERRY: That wasn't one of these applications. A. No.

Q. Did the legal guardian join in these subsequent applications?

A. To the best of my recollection, he did.

Q. Did they have an order of court?

Mr. SMITH: Object to that because it is immaterial. The
184 Act of Congress of July 1st, 1902, commonly called the
Cherokee Treaty, provides, sec. 70, as follows: Allotments
may be selected and homesteads designated for minors by father or
mother of citizens or by guardian or curator, or administrator having
charge of their estate, in the order named.

Q. Answer the question, Mr. Bynum. A. To the best of my
recollection, he did not present such order of court.

Q. Mr. Bynum your department, the Department of the Com-
missioner, rather, holds that the person having the right to act in
the matter of relinquishment and confession of judgment and about
these allotments, is in the order named in this section I have read?

A. That has not been held to be a strict rule.

Mr. SMITH: The relators offer in evidence the following motion
of contestee to confess judgment in contest case No. 4848, styled
Herman Knight Contestant, vs. Eva Waters, a minor, contestee,
involving the N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4
of the S. E. 4 of the N. W. 4 of Section 19, Township 20 North,
Range 13 East, containing 30 acres.

Motion of Contest to Confess Judgment.

Now comes the above named contestee, Eva Waters, a minor, by
her father and legal guardian, C. W. Waters, and her mother,
Maudie Waters, and makes this her motion to confess judgment,
in favor of the contestant herein; and asks that she be al-
185 lowed so to confess judgment, and that the land in con-
troversy be allotted to the contestant, upon the following
grounds, and for the following reasons: The contestee, through
her mother, Maudie Waters, filed upon the land in controversy on
the 27th day of August, 1907; said land is described as follows:
N. 2 of the S. E. 4 of the N. W. 4 and the S. W. 4 of the S. E. 4
of the N. W. 4, of Sec. 19, Township 20 North, Range 13 East, con-
taining 30 acres, more or less. Thereafter, and on the blank date
of blank, 190- the above named contestant, Herman Knight, lodged
a contest against this contestee in the office of the Commissioner
to the Five Civilized Tribes, seeking to obtain the above described
land in allotment and the said contest ever since has been and now
is pending. The contestee is entitled to an allotment, if at all,
under the act of April 26, 1906, and not otherwise. And the right
of this contestee to enrollment or to an allotment of the lands of the
Cherokee Nation has never been finally decided, and it is still a
matter of doubt as to whether she will receive an allotment. The
contestant, Herman Knight, is an adult citizen of the Cherokee
Nation on the regular rolls thereof. Since the institution of the
said contest, the said land has become by reason of prospecting

for and development of lands in the vicinity for oil, very valuable for oil purposes. The lands immediately adjacent to this land on all sides have been developed for oil and there are now on all of the lines of this land producing oil wells as are shown on 186 the map attached and marked Exhibit "1." That some of said wells have been producing for at least six months, and have drained the land during all of that time. And the wells at present producing are being shot and are rapidly draining the land in contest of all oil located underneath the same. That if the land is so drained much longer it will lose practically all of its value for oil and gas, and that said value is all which the land possesses. The guardian of said contestee has arranged with the contestant a compromise of this contest by the terms of which the contestant is to be allowed to file on the land and the contestee is to withdraw this contest. In consideration the contestee to receive the sum of \$7200.00, which is to be deposited in escrow as the Commissioner directs, payable when patents have issued to the said contestant. The guardian of the said contestee has made diligent enquiry and investigation and from all of the information which he has obtained is of the opinion that it would be very much to the interest of the contestee that said compromise shall be made, so that the value of said oil under the land may be saved, and at the same time the contestee receive for the same a fair compensation.

Wherefore, the contestee by her guardian as aforesaid, prays the Commissioner that the contestee be allowed to confess judgment, and withdraw her filing from the land in contest, and be allowed to file elsewhere.

(Signed)

C. W. WATERS,
Guardian of Eva Waters, Minor.
MAUDIE WATERS,
Mother of Eva Waters.

187 STATE OF OKLAHOMA,
County of Muskogee, ss:

C. W. Waters, being first duly sworn, deposes and says that he is the legal guardian of Eva Waters a minor, the contestee in the above named contest; that he has read the above motion for confession of judgment, and understands the same, and that the same is true.

(Signed)

C. W. WATERS.

Subscribed and sworn to before me this 6th day of April, 1909.
WALTER W. CHAPPELL,
Notary Public.

With notarial seal of Muskogee County, Oklahoma.
My commission expires January 13, 1910.

Mr. SMITH: It is agreed that——

Mr. COOK: It is hereby stipulated and agreed between counsel that the above motion of contestee to confess judgment is a true

copy of the original on file in the office of the Commissioner to the Five Civilized Tribes, and shall be so considered in this proceeding.

Mr. SMITH: Shall be taken with like force and effect as the original.

Mr. SMITH:

Q. Mr. Bynum were the deeds to Knight and Twist, respectively, which you have mentioned as having been executed by the Chief of the Cherokee Nation, descriptive of the lands as to which contestant conveyed—that is in each case the lands they are
188 contesting for—did you compare these deeds with the record to see that they were correct in that respect? A. They were compared and were correct.

Mr. SMITH: The relators offer in evidence the decision in the case No. 4922, William J. Twist vs. Eva Waters, and 4848, Herman Knight vs. Eva Waters, of the first Ass't Secretary of the Interior of date June 24, 1909.

To the Commissioner of Indian Affairs.

SIR: This is a motion filed June 9, 1909, on behalf of Eva Waters, contestee in the above entitled cause, seeking the review of the Departmental decision of May 10, 1909, permitting her to withdraw from said contest by a confession of judgment, and awarding the land in controversy to the contestants, according to the respective tracts claimed by each. The evidence adduced in support of the motion shows that the consideration for said withdrawal, receivable by her with the Department's sanction, under its said order of May 10, 1909, is not at all commensurate with the extent of her potential in the land in controversy. The case is analogous to those judicial sales which the court upon proper application within seasonable time will set aside on account of inadequacy of consideration.

It is further quite patent that the increasing valuation renders any present appraisement hazardous. Moved by these considerations and that the interest of the minor contestee may in no
189 way be impaired by previous departmental action, the decision of May 10, 1909, is hereby vacated. The contest cases will therefore be considered and disposed of on their merits. The case of Twist vs. Waters is now ready for determination, but in view of this action, and certain matters brought into the case in support of the motion, the parties in interest should have a reasonable time within which to submit further argument in said contest case, if they desire. You will kindly notify the attorneys of record in said contest in person or by registered mail that they will be allowed ten days from receipt of notice in which to submit such further arguments or matters under said contest as they desire. The case of Knight vs. Waters will be the subject of a separate communication.

Very respectfully,
(Signed)

FRANK PIERCE,
First Assistant Secretary.

Mr. COOK: It is agreed by and between counsel for the parties hereto that the separate order referred to in the decision which is just read into the record, shall, if received by the Commissioner to the Five Civilized Tribes prior to the time the notes taken in this proceeding are transcribed, that the same shall be, by the Chief clerk of the Commissioner to the Five Civilized Tribes, dictated into this record, and shall be considered as a part of this proceeding.

Mr. SMITH: And it is stipulated that the decision of June 24th, just read into the record, may be read in evidence and taken
190 with like force and effect as the original on file with the Commissioner of which the above is a true copy.

It is further stipulated that the confession of judgment by Charles Waters, and Eva Waters, in the Twist case, is identical with the confession of judgment in the Knight case just read, except as to consideration heretofore read into the record, and may be taken by the court.

Mr. BYNUM (Reading into record order, as per stipulation on page 30):

JUNE 30, 1909.

Commissioner of Indian Affairs.

SIR: Referring to my decision of June 24th, 1909, relating to the Cherokee allotment contests of Twist vs. Waters and Knight vs. Waters, you are requested to inform the Commissioner to the Five Civilized Tribes that the Department desires him to proceed at once to hear and adjudicate the latter case and to make his action thereon special.

To insure expedition on the part of all concerned, it is also directed that no dilatory tactics whatever be permitted, and that all unnecessary delays be avoided in all offices of the department as to this case. The papers in the Knight-Waters case are herewith.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

DIXON H. BYNUM.

191 JAMES M. GIVENS, first having been duly sworn, upon his oath deposes and says:

On direct examination.

By Mr. SMITH:

Q. State your name, age, and residence. A. James M. Givens; 40 years old; Muskogee, Oklahoma.

Q. Occupation? A. Attorney at Law.

Q. Mr. Givens, were you present on the 24th day of June, 1909, when Assistant Secretary of the Interior, Pierce, vacated his order of June 10th, 1909,—May 10th, 1909, in the Twist-Waters cases?

A. I was; I think the date was June 24th, 1909.

Q. State who was present on that occasion. A. As I remember there were present, beside Acting Secretary of the Interior, Judge Pollock, an assistant to the Assistant Attorney General of the De-

partment of the Interior, Messrs. Serven and Mohun, of the firm of McGowan, Serven & Mohun, Mr. W. A. Scofield, an attorney of Westville, Oklahoma, Mr. E. R. Perry, of Tulsa, Oklahoma, and myself. In addition I remember that there was a stenographer present, who took down in shorthand, the opinion of the Acting Assistant Secretary of the Interior. There may have been other persons present, but I remember distinctly that those persons whom I have mentioned were present.

Q. At that time, did the Ass't Secretary of the Interior or Acting Secretary of the Interior Pierce, say anything about having been misled by anybody in connection with his action of May 192 10th, in the Twist-Waters and Knight-Waters cases?

Mr. Cook: I object to the question in that form. It is leading.

A. He did not.

Cross-examination.

By Mr. Cook:

Q. Mr. Givens, did you file an answer to the motion to review the decision of the Secretary and also a motion to dismiss the confession of judgment in the Knight vs. Waters case? A. We did.

Q. Did you also file one in the Twist-Waters contest? A. We did.

JAMES M. GIVENS.

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Filed September 4, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

At Law. No. 51809.

WILLIAM J. TWIST, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Be it known, that — an examination of witnesses begun and held on the 24th and 25th days of August, A. D. 1909, when the depositions hereto attached were taken, I, Guy L. Reed, a Notary Public in and for the State and County aforesaid, did cause to be personally present before me at the office of R. W. Kellough, at Tulsa, Oklahoma, the following named witnesses, viz: — — — —, to testify

on the part and behalf of the relator in a certain cause now pending in the Supreme Court of the District of Columbia wherein
194 the United States of America, on the relation of Herman Knight and William J. Twist, respectively, is relator, and Richard A. Ballinger, Secretary of the Interior, is respondent; it being agreed by and between the parties that the testimony here taken shall apply to both causes Nos. 51808 and 51809; that the testimony shall be reported and transcribed by Giles A. Penick, instead of by the Notary Public; and that witnesses subpoenaed for the 25th of August may be examined on the 24th.

Present on behalf of the relator, Messrs. Zevely, Givens & Smith and Mr. E. R. Perry, and on behalf of the respondent, Mr. J. Carter Cook.

The witnesses above named, being of lawful age, were by me sworn before any question was put to them, to tell the truth, the whole truth, and nothing but the truth, relative to said cause, and thereupon the said witnesses deposed and said as follows:

JOHN ROY, being first duly sworn, upon his oath, deposes and states as follows:

Direct-examination.

By Mr. ZEVELY:

Q. State your name, please, and your occupation, and your age and residence. A. John Roy, Tulsa, 47 years old; oil producer.

Q. How long have you been in the business of producing oil, Mr. Roy? A. Over thirty years.

195 Q. Where have your employments been? A. Pennsylvania, Ohio, West Virginia, and Oklahoma.

Q. How long have you been in Oklahoma? A. Two years.

Q. In what branches of the oil producing business have you been engaged? A. I have been in the producing business entirely.

Q. Just state in detail what you mean. A. As superintendent and owner.

Q. Owner of leases? A. Yes sir, and wells.

Q. Purchaser of leases? A. Yes sir.

Q. Buying and selling leases? A. Yes sir.

Q. And drilling of property? A. Yes sir.

Q. You have been sitting here and heard most of this testimony, haven't you, Mr. Roy? A. Yes sir.

Q. And heard the description of this land here? A. Yes sir.

Q. Are you familiar with the land? A. I have been on the land twice, and driven past it a good many times.

Q. When were you on the land more recently? A. On the land last, last Saturday.

Q. Last Saturday? A. Yes sir.

Q. Did you make any investigation then of the wells drilled on the land immediately adjacent to this fifty acres? A. I didn't make an investigation; I enquired and tried to inform myself.

Q. Know how many there are? A. If I remember right,
196 eighteen or twenty wells.

Q. Do you know approximately what these wells are pro-
13—2138A

ducing now? A. Only from what enquiries I made; I judge these wells from sixty to a hundred barrel wells.

Mr. Cook: On behalf of respondent, ask that the answer of this witness as to the production be stricken out as he testifies not on his own knowledge.

A. On the south side of that property I understand is light. There is only one well, I understand; the southwest corner is a light well.

Q. Mr. Roy, from your long experience in the oil business and from your knowledge of this property and the lands, the developed lands, which surround it, what would you say is its market value today, the fee title, free from incumbrance of lease, or any other incumbrance? A. Well I should say three hundred dollars an acre would be a good price for it.

Q. Three hundred dollars an acre? A. Yes sir.

Q. Mr. Roy, from your experience as an oil man and your knowledge of this locality, the situation of this land in controversy, what in your opinion would have been a fair bonus to have paid for a lease on this land an oil and gas mining lease on this land, in April 1909, considering that the royalty was twelve and a half per cent, and that the lease was a regular government form lease? A. Well, I should say no more than two hundred dollars an acre.

197 Q. Not more than two hundred dollars an acre? A. Yes sir.

Cross-examination.

By Mr. Cook:

Q. Mr. Roy, — you a member of any oil companies? A. Yes sir.

Q. What are those companies? A. The Vernon Oil Company.

Q. Are you interested either directly or indirectly in any companies owning leases contiguous to this fifty acres? A. No sir.

Q. You give it as your opinion, Mr. Roy, that two hundred dollars an acre is a fair valuation for this property, bonus for this property, is it given—is that estimate based as being offered by a prospective purchaser, who wanted to get into the oil business, or one that is overloaded in the oil business?

Mr. ZEVELY: The same objection, Mr. Stenographer.

A. I didn't understand that question.

Q. That two hundred dollars bonus — a fair valuation from a man anxious to get in the oil business, or one overloaded? A. I think it a very fair valuation for anybody; it might be an error in judgment, of course, but the question that was asked was what I would give for a lease bearing a royalty of twelve and half per cent in April.

Q. That estimate based upon personal investigation or from information given you by others? A. Well, generally from information given me by others. I never worked on the property.

198 Q. Have you been in Tulsa all this summer? A. Yes sir.

Q. Since spring? A. Yes sir.

JOHN ROY,

Motion to Dismiss.

Filed October 6, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

v.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled action and moves the court to dismiss the petition heretofore filed in said cause for the following reasons:

1. Because, by reason of those matters set forth in respondent's supplementary answer filed, according to the requirements of law and rules of practice, in said action, on September 1, 1909, to wit, that title to the land in controversy has already passed to other parties, and is beyond the jurisdiction of your respondent to control, the subject matter of relator's complaint and the issues presented by the pleadings herein, present purely a moot question.

199 2. Because the relator has failed diligently to prosecute this action in that to the matters aforesaid, set forth in respondent's supplementary answer aforesaid, said relator has neither joined issue by replication nor has demurred thereto, nor has in any respect answered the exigencies of said supplementary answer.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Att'ys for Respondent.

To Brandenburg & Brandenburg, Attorneys for Relator.

SIR: Please take notice that the foregoing motion will be set down for hearing before Mr. Chief Justice Clabaugh on Friday, the 8 day of October, 1909, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

OSCAR LAWLER,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Attorneys for the Respondent.

Service of copy of the foregoing motion and notice accepted this 5 day of October, 1909.

BRANDENBURG & BRANDENBURG,
Per O., Attorneys for Relator.

200 *Motion to Strike Supplemental Answer and Notice of Hearing.*

Filed October 13, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA on the Relation of HERMAN KNIGHT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the Interior, Defendant.

Mandamus.

Comes now the petitioner herein, the United States of America on the relation of Herman Knight, by its attorneys and moves the Court to strike from the files of this case, the so-called supplemental answer filed herein by the defendant on the 1st day of September, A. D., 1909.

And for cause therefore says:

First. For that the said so-called supplemental answer was filed without leave of Court first had and obtained, after issue had been joined in this cause and testimony taken thereon.

Second. For that by the said so-called supplemental answer, an entirely different issue was raised from that set up in the pleadings upon which issue had been joined and testimony taken.

Third. For that the said so-called supplemental answer presents propositions inconsistent with each other.

ZEVELY, GIVENS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

201 Oscar Lawler, Esq., Attorney for Defendant.

DEAR SIR: Please take notice that we shall call the foregoing motion to the attention of Mr. Chief Justice Clabaugh, holding Circuit Court No. 2, at the hour of 10 o'clock A. M., on the 14th day of October, A. D., 1909.

ZEVELY, GIVEN & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Relator.

Supreme Court of the District of Columbia.

THURSDAY, *October 14th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Cla-
baugh, Chief Justice, presiding.

No. 51808. At Law.

THE UNITED STATES OF AMERICA on the Relation of HERMAN
KNIGHT, Pl'ff,

vs.

RICHARD A. BALLINGER, Secretary of the Department of the In-
terior, Def't.

This cause coming on to be heard, Mr. Edwin C. Brandenburg,
attorney for plaintiff, moves that Messrs. J. W. Zevely and Edgar
Smith of Oklahoma, may be heard on behalf of plaintiff for the pur-
poses of this case, which is by the Court granted.

Whereupon, the motion of petitioner filed herein by his
202 attorneys, October 13th, 1909, to strike from the files "the so-
called supplemental answer," filed herein September 1st,
1909, coming on for hearing the respondent by his attorneys moves
for leave to file said answer on September 1st, 1909, nunc pro tunc,
which is hereby granted, and so ordered.

Thereupon, the petitioner, by his attorneys in open Court, with-
draws the aforesaid motion filed October 13th, 1909, and moves for
leave to demur to said supplemental answer forthwith, which is
hereby granted, and thereupon said demurrer is filed.

Further, the respondent by his attorneys in open court withdraws
his motion filed herein October 6th, 1909, to dismiss the petition
herein.

Whereupon, attorneys for the respective parties after argument of
this cause upon the demurrer to said supplemental answer, submit
the same to the Court for consideration, whereupon it is ordered that
said demurrer be, and the same is hereby overruled, with leave to
petitioner to plead over as advised within ten days hereof.

203 *Demurrer to Supplemental Answer.*

Filed October 14, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES ex Rel. HERMAN KNIGHT

vs.

RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator by his attorneys, and demurs to the so-
called supplemental answer of the respondent, filed September 1,

1909, to the amended petition in the above entitled cause, and says that the same is bad in substance.

ZEVELY, GIBBONS & SMITH,
BRANDENBURG & BRANDENBURG,
Attorneys for Petitioner.

NOTE.—Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the so-called supplemental answer raises an entirely different issue from that set up in the pleadings on which issue had been joined and testimony taken.

2. That the said so-called supplemental answer presents propositions inconsistent with each other.

3. That the facts set up in the so-called supplemental answer that a deed has been issued and delivered to a third party for the property involved in this case, since the joinder of issue herein, operates to relieve respondent from any further duty in reference thereto and that therefore the question involved in the petition is a moot one and also a sufficient defense to the relief claimed, does not in law constitute a good defense.

Replication to Supplemental Answer.

Filed October 25, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

THE UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.

RICHARD A. BALLINGER, Secretary of the Department of Interior.

Mandamus.

Comes now the relator, Herman Knight, by his attorneys and without waiving his rights under the demurrer heretofore filed, for replication traverses and denies each and every of the allegations of the so-called supplemental answer filed herein on the 1st day of September, A. D., 1909.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

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Joinder of Issue.

Filed October 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

v.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

Comes now the respondent in the above-entitled cause, by his attorneys, and joins issue upon the relator's replication to respondent's supplementary answer to the rule to show cause.

OSCAR LAWLER,

Assistant Attorney General.

F. W. CLEMENTS, *First Assistant Attorney.*

C. E. WRIGHT, *Assistant Attorney.*

BRANDENBURG & BRANDENBURG,

Attorneys for Respondent.

Motion to Set Cause for Hearing.

Filed November 26, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51808.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

Mandamus.

206 Comes now the petitioner in the above entitled action and moves the Court to set a day for the hearing of said cause.

BRANDENBURG & BRANDENBURG,

ZEVELY GIVENS & SMITH,

Attorneys for Petitioner.

Oscar Lawler, F. W. Clements, C. N. Wright, Attorneys for Defendant:

Please take notice that on Friday morning, December 3rd, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be

heard, we shall call the above motion to the attention of Mr. Chief Justice Wright, holding Circuit Court No. 1.

BRANDENBURG & BRANDENBURG,
ZEVELY, GIVENS & SMITH,
Attorneys for Petitioner.

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Copy of Patent.

Filed December 13, 1909.

Allotment Deed 35087A. Cherokee New Born Roll No. 325.

The Cherokee Nation (Formerly Indian Territory), Oklahoma.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

Whereas, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Eva Waters, a citizen of said tribe, as an allotment, exclusive of land equal in value to
208 forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid,

Now, therefore, I, the undersigned, Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said Eva Waters all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz: The South West Quarter of the North West Quarter of the South East Quarter of Section Seventeen (17), Township Twenty-seven (27) North and Range Sixteen (16) East, and the East Twenty (20) Acres of Lot Two (2) and the West Half of the South East Quarter of the North West Quarter and the North East Quarter of the South East Quarter of the North West Quarter of Section Nineteen (19), Township Twenty (20) North and Range Thirteen (13) East, and the North Half of the North East Quarter of the South East Quarter of Section Twenty-three (23), Township Nineteen (19) North and Range Twenty-five (25) East of the Indian Base and Meridian, in Oklahoma, containing Eighty (80) acres, more or less, as the case may be, according to the United States

survey thereof, subject, however, to all the provisions of said Act of Congress.

In witness whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this day of Aug. 21, A. D. 1909.

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W. C. ROGERS,
Principal Chief of the Cherokee Nation.

DEPARTMENT OF THE INTERIOR.

Approved Aug. 25, 1909.

RICHARD A. BALLINGER, *Secretary*, [SEAL.]
By OLIVER A. PHELPS, *Clerk*.

Filed for record on the 27 day of Aug. 1909, at 4 o'clock P. M.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the record of Deeds of The Cherokee Nation and that the above and foregoing is a true and correct Copy of the Allotment to Eva Waters as the same appears of record in Book 77, Page 36 of Allotment Deed Record.

In testimony whereof witness my hand this 3 day of Sep., 1909.

DIXON H. BYNUM,
Chief Clerk, in Charge.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the reverse side hereof is a true and correct copy of the receipt evidencing the delivery of deeds to the allotment of Eva Waters, a minor citizen of the Cherokee Nation enrolled under the Act of April 26, 1906, opposite number 325 on the roll of such citizens.

DIXON H. BYNUM,
Chief Clerk, in Charge.

Muskogee, Oklahoma, September 3, 1909.

(Endorsed.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, OKLA., Aug. 27, 1909.

Received of the Commissioner to the Five Civilized Tribes the

following Deeds issued to Eva Waters Cherokee New Born Roll No. 325, and recorded in the office of said Commissioner:

Homestead No. 35087A.

Allotment No. 35087 A.

(Signed)

C. W. WATERS, *Guardian*.

Post Office, Westville, Okla.

Witnesses to mark:

_____.
_____.

211 Supreme Court of the District of Columbia.

MONDAY, *December 13th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Claibagh, Chief Justice, presiding.

* * * * *

No. 51808. At Law.

UNITED STATES OF AMERICA ex Rel. HERMAN KNIGHT
vs.

RICHARD A. BALLINGER, Secretary of the Interior.

This cause coming on to be heard upon the pleadings the relator offered to read in evidence, the depositions heretofore taken and filed in this cause which were thereupon identified by the Clerk and marked "F. C. O'C., Dec. 13", 1909," but the Court declined to admit said depositions to be read in evidence, to which ruling exception was noted; whereupon the respondent offered in evidence a patent to the land in controversy issued as set forth in the supplemental answer of the respondent herein filed, to which objection was made by the relator and overruled, and the same was thereupon admitted in evidence, to which ruling the relator then and there noted an exception; that thereupon after due consideration by the Court, it is this 13th day of December, 1909, adjudged and ordered that the rule to show cause heretofore issued herein be discharged, that the prayers of the original and amended petitions herein filed be and the same are hereby denied, and that the original and
212 amended petitions be and the same are hereby dismissed, with costs, against said relator, for which execution shall issue. Appeal noted in open Court and bond for costs fixed at One Hundred Dollars.

Memorandum.

January 3, 1910.—\$100 deposited in lieu of bond on appeal.

Supreme Court of the District of Columbia.

| No. | Parties. | Action. | Plaintiff's attorney. |
|--------|---|-----------|---|
| 51808. | The United States of America <i>ex relatione</i> Herman Knight v. Richard A. Ballinger, Secretary of the Department of the Interior. | Mandamus. | Zevely, Givens & Smith, Brandenburg & Brandenburg. Defendant's attorney. Oscar Lawler. |

| Date. | Proceedings. |
|----------------|--|
| 1909, July 16. | Deposit toward costs by Zevely. |
| " " " | Appearance, order; Petition, Aff't & Exhibits A, B, & C, filed. |
| " " " | Respondent required to show cause why writ should not issue by 23 rd inst. (M. 52, p. 342). |
| " " " | Rule to show cause (2) & copy petition issued. |
| " " " | Rule to show cause (2) & copy petition served. |

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| | |
|----------------|---|
| 1909, July 19. | Appearance Lawler for Def't.—Mo. to dismiss & notice filed. |
| " " 23. | Answer to rule |
| " " " | Leave to file amended petition (M. 52, p. 347). |
| " " " | Amended petition & Aff't |
| " " " | Stipulation that answer be deemed answer to amended Petition & appearance Brandenburg for Relator |
| " " " | Stipulation making exhibits to original petition part of amended petition |
| " " 28. | Replication |
| " " 30. | Joinder in Issue |
| " " " | Notice of trial |
| " Aug. 3. | Hearing set for Sept. 2/09 (M. 52, p. 354). |
| " " 16. | Notices (2) to take depositions |
| " " 19. | " (2) " " testimony |
| " " 19. | " (2) " produce |
| " Sept. 1. | Supplemental Answer |
| " " 2. | Depositions before Guy L. Reed, Okla., |
| " " " | " " Chester A. Cowper |
| " " " | " " of John Roy |
| " Oct. 6. | Mo. to dismiss & Notice |
| " " 13. | " " strike out Supplemental Answer & notice |

- 1909, Oct. 14. Leave granted to file supplemental answer (Sept. 1, '09) *nunc pro tunc*. Mo. of Oct. 13, '09, withdrawn & leave granted to demur to sup. answer forthwith (M. 52, p. 383).
- " " " Demurrer filed.
- " " " Mo. of Oct. 6, '09, withdrawn. Demurrer to sup. answer overruled with leave to plead in 10 days (M. 52, p. 383).

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- 1909, Oct. 25. Replication to Answer filed.
- " " 28. Joinder in issue "
- " Nov. 26. Mo. to set case for trial & notice "
- " Dec. 13. Copy of Patent "
- " " " Rule to show cause discharged & Petitions dismissed at Relator's costs; appeal noted—bond \$100 (M. 52, p. 469).
- 1910, Jan'y 3. Deposit \$100 by Brandenburg in lieu of appeal bond.
- " " " Depositions of Jno. Roy & of Sep. 2, '09, published by Clerk.
- " " 22. Designation of record filed.
- " Feb'y 3. Time to file record extended to M'ch 15, '10, inc. (M. 54, p. 44).

Directions to Clerk for Preparation of Transcript of Record.

Filed January 22, 1910.

In the Supreme Court of the District of Columbia, the 22 Day of January, 1910.

At Law. No. 51808.

U. S. ex Rel. KNIGHT

vs.

BALLINGER.

The Clerk of said Court will please prepare record on appeal:

Petition, affidavits & Ex.

Rule to show cause.

Motion to dismiss.

215 Answer.

Amended pet. & aff't.

Stip. as to answer.

" " " exhibits.

Replication.

Joinder of Issue.

Notice of trial.

Order Aug. 3, setting case for hearing.

Supp'l Answer.

All depositions.

Mo. to dismiss.
 " " strike.
 Leave to file Sup. Answer.
 Mo. withdrawn.
 Demurrer.
 Mo. withdrawn.
 Order overruling Demurrer.
 Rep. to Answer.
 Joinder in issue.
 Mo. to set case for trial.
 Copy patent.
 Rule discharged & pet. dismissed.
 Bond.
 Docket entries.

BRANDENBURG & BRANDENBURG,
Att'ys for Pl't'ff.

OSCAR LAWLER,
Ass't Att'y Gen.,
 By C. E. WRIGHT.

216 *Memorandum.*

February 3, 1910.—Time in which to file Transcript of Record extended from time to time to and including April 1, 1910.

217 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 216, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51808 at Law, wherein the United States of America on the relation of Herman Knight is Plaintiff and Richard A. Ballinger, Secretary of the Department of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of March, A. D. 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2138. The United States of America on the relation of Herman Knight, appellant, vs. Richard A. Ballinger, Secretary of the Department of the Interior. Court of Appeals, District of Columbia. Filed Mar. 18, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

MAY 4-1910

Henry W. Hodges,
clerk.
Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2138.

No. 15, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA ON THE RELATION
OF HERMAN KNIGHT, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

STATEMENT AND BRIEF OF APPELLANT.

BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH.

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2138.

No. 15, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA ON THE RELATION
OF HERMAN KNIGHT, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

STATEMENT AND BRIEF OF APPELLANT.

Statement of Facts.

This is an appeal from the Supreme Court of the District of Columbia. There the appellant filed his petition on July 16, 1909, stating, among other things, as follows:

He is a citizen of the Cherokee Nation and as such entitled to take an allotment of land in said Nation, which is now a part of the State of Oklahoma, and that on the 28th day of August, 1907, he made an application to the Commissioner to the Five Civilized Tribes in the Cherokee land office to take as his allotment certain lands particularly described in the petition and shown by the printed record in this case at

page two. At the time of his application for said described land it appeared that prior thereto on the 21st day of the same month, said land had been selected by Maudie Waters to be taken as a tentative allotment for her minor child, Eva Waters, the said Eva Waters belonging to a class of citizens who had not had adjudicated their right to take an allotment in the Cherokee Nation. Hence the tentative allotment to her. Under the rules of practice providing for the selection of these allotments by the Department of the Interior, it was necessary for the appellant to enter contest against the tentative selection by Eva Waters, which he did. The various proceedings had touching said contest culminated in a decision by the Secretary of the Department of the Interior on May 11, 1909, awarding the said land to appellant and a direction by the Secretary of the Department of the Interior to the Principal Chief of the Cherokee Nation to issue the deeds to said land to the appellant (Record, pages 11-13 and 83). Deeds were issued to said appellant in strict conformity with the proceeding mentioned and transmitted to the Department of the Interior in Washington by the Commissioner to the Five Civilized Tribes. The Secretary of the Interior then refused to deliver said deeds and this suit was brought alleging the facts above enumerated and averring that no discretionary power remained in the Secretary of the Department of the Interior relative to said transaction and that the appellant was entitled to have said deeds delivered to him and that it was the duty of the Secretary of the Department of the Interior to deliver such deeds to appellant.

On the 16th day of July, 1909, rule to show cause why a mandamus should not issue was passed and the respondent ordered to show cause on or before the 23d day of July, 1909, why the writ of mandamus should not be issued as prayed in said petition. On the 22d day of July, 1909, there was lengthy answer filed for the respondent by Frank Pierce, as Acting Secretary (Record, pages 15 to 20). In this answer it is asserted, in substance, that in the proceeding of May 10, 1909, he did nothing but announce that

"He would in due course of the administration of the affairs of his office, in the absence of any facts which might thereafter develop to change said determination award to the said relator the right to select said lands under the provisions of the Act of Congress of July 1, 1902" (Record, page 16).

Attention is called to the tenor of the decision (Record, pages 11 to 13), and the telegram quoted at page 16.

It is admitted that respondent refuses to deliver said deed but denied that the execution of the deed by the Principal Chief of the Cherokee Nation conveyed title to the land in controversy to the appellant, and denied that the proceedings had reached that stage at which all power of the Secretary ceased except to perform ministerial acts. It is denied that the refusal to deliver the deed was through misconception of the force and effect of the execution of the deeds by the Principal Chief of the Cherokee Nation and the misconception of the force and effect of the actions of the Department of the Interior. It is denied that the respondent had any knowledge of whether or not the agents of the appellant had entered upon the said land and at the direction of the Department of the Interior expended large sums of money in the development thereof for oil and gas mining purposes, and denied that the respondent, through Frank Pierce, Acting Secretary, had authorized the appellant's tenants to proceed with the development of the land for the purpose of prospecting for and producing oil and natural gas from the said lands (Record, page 17). (Attention is called to record of the testimony, at page 50.)

It is admitted that the appellant is a Cherokee Indian and entitled to take an allotment in the Cherokee Nation and that deeds or patents to the land in controversy herein were signed by the Principal Chief of the Cherokee Nation and that this execution by the Principal Chief was under the direction of the Secretary. A replication was filed to the answer (Record, pages 25 and 29), which alleged that the

statement of the answer to the effect that the Assistant Secretary had been led to the action which he took by representations of counsel, was untrue, and averred that he had refused the offer first made by the tenants of the appellant for a relinquishment of the tentative filing of Eva Waters and had himself fixed the sum of twenty-five thousand dollars as being the proper sum, and that he fixed this after he had himself personally gone upon this land and made an investigation of its value and after he had had, in addition, a full hearing upon testimony of experts and report of Commissioner to Five Tribes as to the value of the said lands, and that it was upon his own personally-conducted inquiry that he took the action of May 10 and ordered the deeds on May 11, upon payment of the sum of money demanded by him for said minor. The respondent also specifically puts in issue the sworn statement of Pierce that he did not authorize the tenants of the appellant to develop the land for oil and gas mining purposes (Record, page 26).

On July 30, 1909, issue was formally joined by the respondent upon the replication of the appellant to the respondent's answer to the rule to show cause (Record, page 29). On the same day the respondent served notice that he would ask the court that the issue joined be set for trial at an early date, and on August 3, 1909, upon motion of the respondent, the cause was set for hearing on the 2d day of September, 1909.

Attention is called to the tenor of that part of paragraph 6 of the answer which seeks to convey the impression that no decision was reached awarding the land to appellant, which alleges

"the fact to be that on May 10, 1909, said respondent *announced* that in consideration of facts then before him as such Acting Secretary of the Department of the Interior, he *would*, in the due course of the administration of the affairs of his office, *in the absence of any facts which might thereafter develop to change said determination*, award the said relator the right to select the said lands, etc." (Italics ours.)

See decision itself (Record, pages 11-13) and telegram (Record, pages 16, 83).

It will be observed that there was not only a joinder of issue but a sharp controversy as to the facts relating to the development of the land by the appellant under the authority of the Assistant Secretary, Frank Pierce, and the expenditure of large sums of money thereabouts, while *he*, the said Assistant Secretary, was certain enough that the transaction had ended, to give this permission and permit this expenditure.

The appellant then proceeded to take depositions of numerous witnesses familiar with the proceedings before the Department of the Interior, of witnesses who were cognizant of what the Assistant Secretary did and said about the case while it was pending before him; of witnesses familiar with the value of oil lands and familiar with the land in controversy and its value, and who knew of the expenditure made by the appellant on said land and of witnesses who knew that the tenants of the appellant had been instructed by Pierce to develop it. All of this testimony was taken in August, 1909.

The respondent did not fairly and squarely meet the issues which he had tendered. He did not meet them at all. What he did do was to refrain from taking a word of testimony in support of the allegations which he had made. On September 1, 1909, he filed what he was pleased to term a supplemental answer, which set up that since the joinder of the issues in this cause he had caused patents to be issued and delivered to Eva Waters and took the position that the question had become moot and asked for the dismissal of the cause.

It was to compel the Secretary to deliver the deed which had already been executed under the written direction of the Secretary to the Principal Chief of the Cherokee Nation, that this suit was brought. After the issues were joined and the cause set for trial the Secretary conceived the idea

that the best way to fight this suit was to issue a patent to Eva Waters while the very question of the delivery of the deed previously executed covering the same land was pending before the Supreme Court of the District of Columbia. But the Secretary went even further than this. He delivered a deed to Eva Waters, who was and is admittedly a person whose right to take any allotment in the Cherokee Nation is disputed. That controversy was then and is now pending before the Supreme Court of the United States. There are a great number of persons belonging to the same class to which Eva Waters belongs. Whether any of these persons will ever be entitled to take an allotment in the Cherokee Nation depends upon the decision of the Supreme Court of the United States, which has not yet been rendered. By order of the Secretary the Department of the Interior was instructed to issue no patents to any of this class of persons. Thereafter none were issued to anybody except Eva Waters. The order never was revoked. This case was made an exception.

This case came on for hearing in the Supreme Court of the District of Columbia on the 14th day of October, 1909. The court refused to hear the depositions in behalf of the appellant upon the issues joined, but proceeded to a consideration of the case upon the pleadings and the respondent's so-called supplemental answer setting up the deed issued to Eva Waters. It was the contention of the appellant that it made no difference how many deeds had been delivered to Eva Waters, or any number of persons, but that the real question before the court was whether or not the deed executed to the appellant must be delivered. The question of law was with reference to whether or not the title had passed to appellant by the execution of that deed and whether or not that which remained to be done was purely ministerial. If the appellant was right then the court missed trying the real issue in the case. The result was that the court arrived at the remarkable situation of the Secretary being

able to render unnecessary a determination of the real issue in the cause by an act of the Secretary, the respondent in the suit, subsequent to the joinder of the issues. The court rendering the decision ordered the rule to show cause discharged and the prayer of the petition denied and the petition dismissed with costs against the appellant.

Assignments of Error.

1. The court erred in holding that the action of appellee in issuing patent for the lands involved in said suit to Eva Waters constituted a defense to the action.

2. The court erred in finding and holding that appellee had any power or control over the said patent other than to deliver the same to appellant after having directed that the same be executed by the Chief of the Cherokee Nation in favor of appellant.

3. The court erred in failing to find that the action of the appellee on May 11, 1909, awarding the land here involved to appellant was final, and pursuant to which appellant was entitled to a patent.

4. The court erred in failing to find and hold that the action of the appellee in his telegram of May 11, 1909, to Ryan, acting Commissioner, awarding the lands here involved to appellant provided that payment of a certain sum of money be made to the said acting Commissioner within a time limited and the subsequent payment of the said sum of money to the acting Commissioner by appellant in accordance with the said award, followed by the preparation and execution of the deed to appellant by the Chief of the Cherokee Nation entitled him to the said deed.

5. The court erred in failing to find and hold that the acceptance of the terms and the payment of the price fixed

by appellee as a condition for the awarding of the lands here involved to appellant entitled him to said lands and left but a mere ministerial duty for appellee to perform.

6. The court erred in finding and holding that the action of appellee in issuing deed for said land to Eva Waters after the issuance of the rule to show cause by the court below, the taking of the testimony, the filing of the answer, and the joinder of issue thereon constituted a good defense to appellant's claim to the deed to said property.

7. The court erred in holding that the action of appellee in issuing deed for said land to Eva Waters after the award to appellant and the payment by him of the price fixed made the question a moot one, which justified the dismissal of the case.

8. The court erred in finding and holding that the inability of appellee to perform in the event of the issuance of the writ, although brought about by his own previous disobedience, constituted a defense to the action.

9. The court erred in failing to hold that appellant was entitled to the deed here involved.

10. The court erred in failing to direct appellee to deliver deed for the lands here involved to appellant.

11. The court erred in denying the prayers of the petitions and directing that the cause be dismissed.

12. The court erred in refusing to permit appellant to read his testimony in evidence.

13. The court erred in admitting as evidence the deed to Eva Waters.

BRIEF AND ARGUMENT.

Effect of Supplemental Answer.

The foregoing statement does not set forth some of the minor features of respondent's contentions under the pleadings as the issues were originally joined. It does, we believe, set forth the gist of the whole matter with sufficient fulness to enable this court to know the substantial claims of the respective parties. Moreover, the respondent, by his so-called supplemental answer, if it can be considered, abandoned every contention upon his part except the one sought to be put in issue by it, that he had by his own act rendered performance impossible. If this plea is considered it follows that he must stand or fall upon this proposition alone.

Thompson vs. United States, 103 U. S., 431.

The demurrer to the so-called supplemental answer ought to have been sustained (Record, page 102).

If the trial court can be sustained in its holding that the so-called supplemental answer of the respondent is permissible as a plea, then it follows that under the decisions of the Supreme Court of the United States he could have the benefit of no other or former plea.

Relator Complied with Conditions Entitling Him to Patent.

It is believed that the rights of the parties as they existed when the issues were joined upon the 30th day of July, 1909, have not been changed and that they could not have been changed by the subsequent act of one of the parties to the litigation. The Department has always laid stress upon a rule or regulation of its own to the effect that an order in a land contest might be set aside within thirty days from the

date of its rendition, but it wholly fails to distinguish between the character of case which is within such a rule and the character of case presented by this record. The cases which are within the rule which the respondent dwells upon are those which proceed in their course through the Department without those features which have occurred in this case. In this case the land was not only awarded to the appellant, but the appellant was permitted to expend large sums of money developing the premises. Reflect upon what occurred in this case which would, to any rational mind, mean finality. On the 10th day of May, 1909, the decision of the Acting Secretary was made. On that day the Assistant Secretary said:

"I have therefore decided to approve the twenty-five thousand dollar proposition to permit the minor to withdraw her contest and to award the land to Twist and Knight respectively. * * * In accepting this offer the Department will insist that the fund shall not be diminished by any charges upon it for attorney's fees."

Immediately thereafter and on the following day the Assistant Secretary sent the following telegram:

"WASHINGTON, D. C., *May* 11, 1909.

"Ryan, Acting Commissioner, Muskogee, Oklahoma.

"Lands in Twist and Knight cases against Waters will be awarded to Twist and Knight, respectively, upon payment of twenty-five thousand dollars for use of minor Waters. Contestants given including 15th to make payment upon receipt of thirteen thousand more within time allowed. Forward entire twenty-five thousand to Department, endorsed to Secretary, when entire funds received by you. Prepare deeds to respective contestants, and have them executed and forwarded here for approval. Report promised by wire.

(Signed)

"FRANK PIERCE,
"First Assistant Secretary."

11:35 a. m., over the Western Union telegraph wire.

That all of the conditions upon the part of the appellant were complied with is clear. The twenty-five thousand dollars was received on May 13th, and that the deeds or patents to the land in controversy were executed by the Principal Chief of the Cherokee Nation and that the deeds and money were duly forwarded to the Department in Washington.

We contend that the written direction to make the deed was tantamount to an approval of it. In the meantime the tenants, being lessees of the appellant, had been expressly authorized by the Assistant Secretary to develop the land in controversy for oil and gas mining purposes. This they did at considerable expense.

What happened in this proceeding was so different from the mere passing of an order which could be set aside within thirty days that there was no room for a mistake. Pierce regarded it as final, just as much as did the appellant. He would not have taken the responsibility of authorizing business men to expend large sums of money in the development of property for oil and gas, if he had regarded his decision of May 10, followed by his direction for the execution of his deeds and the subsequent acceptance of the twenty-five thousand dollars, as a mere step in the proceedings, subject to be set aside at any time within thirty days. There is no mistaking the fact that the respondent regarded the transaction as finally closed. In fact, respondent's effort to have the matter viewed in a different light does not appeal strongly to good sense or sound morals. He pleads that he did not award the land to the appellant, but merely announced that in effect he might do so at some future time, provided he did not change his mind. Read the 6th paragraph of respondent's answer, at page 16 of the record; then read the decision itself, and especially the conclusion at page 13 of the record, and the telegram at page 83 of the record. It is difficult to conceive of so widely divergent propositions emanating from the same source as the aver-

ment in this answer and the documentary proof of what actually did occur.

This suit was brought to compel the Secretary, by mandamus, to deliver the deed or patent already executed to the appellant, under the circumstances which have been recited. It was believed, and is still believed, that the Secretary, or rather those acting for him, wholly misconceived the force and effect of the execution of the said deed by principal chief and authorization by the Department of the Interior to the appellant to develop the land. The suit was brought upon the theory that there remained in the Department no other or further duty touching this subject-matter save and except the purely ministerial duty of delivering the deed to the appellant. It is not contended that the appellant is not entitled to an allotment. The respondent undertook to stand upon the proposition that he had the right to cancel that transaction and award the land to another person. This we contend he had no right to do, and the whole question is one of the status of the deed which was executed to the appellant. It is contended that that deed operated to vest title in the appellant because there was nothing or further to do except acts, including the recording of the deed in the office of the Commissioner to the Five Civilized Tribes, which were purely ministerial. This is the question which the appellant sought to try in the court below. By reason of the view of the trial court he was forced to try the question of whether, subsequent to the joining of the issues in this case, the Secretary had delivered to another party a deed to the same land. This deed was offered in evidence by the respondent and admitted by the court below, and the court dismissed the original bill. We are called upon to witness the spectacle of one of the parties to a litigation being able to end that litigation by his own act subsequent to the joinder of the issues. We will speak further of this situation, but first we wish to advert to the original proposition, which we do not believe can be put out of this case in any such manner.

In the case of *West vs. Hitchcock*, 19 App. D. C., 333, the court said (page 343) :

“The fact that an act which mandamus seeks to compel is the culmination of a series of proceedings of a judicial or quasi-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus, when the officer or person charged to perform it arbitrarily and without just legal cause refuses such performance. This is so even in reference to strictly judicial proceedings. For a trial court to settle a bill of exceptions or to approve an appeal bond is a judicial function requiring the exercise of judgment and discretion; and yet, if the judge holding the trial court arbitrarily refuses to settle such bill of exceptions, when in due form it has been duly tendered to him, or arbitrarily refuses to approve such appeal bond when it has been duly submitted to him for approval, and is in all respects satisfactory and subject to no reasonable objection, it is elementary law, which requires no elaboration and no citation of authority for its support, that, while his judgment may not be coerced, the performance of his duty may be required of him by means of the writ of mandamus.

* * * * *

“Now, if this be the case in strictly judicial proceedings, it is even more so in regard to the functions of executive officers in the performance of acts wherein individual citizens are interested. To grant a patent for lands, or for an invention in the arts or for a discovery in the sciences, is a quasi-judicial function of the highest nature, which has been committed by Congress to the executive officers of the Government; and the granting or refusal of such a patent ordinarily cannot be questioned in the courts. But when all the proper prerequisites have been complied with, and all the preliminary steps have been taken whereby a party has in law become entitled to a patent, and nothing remains to be done but to issue the patent, it is well settled that such patent

may not then arbitrarily and without just cause be withheld, and that its execution and delivery may be enforced by the writ of mandamus."

The case of *West vs. Hitchcock* was a case which arose in the old Territory of Oklahoma, and in which the proceeding was against Mr. Hitchcock, then Secretary of the Interior. It seems that the relator in this case is well within the rule announced in *West vs. Hitchcock*. All proper prerequisites had been complied with and all preliminary steps taken which entitled the relator to the patent. He was a citizen of the Cherokee Nation by blood. Eva Waters, with whom he had a contest as to the tract of land consisting of thirty acres, was and is a person whose right to take land in the Cherokee Nation has not been adjudicated by the Supreme Court of the United States, in which the cause is now pending. It was within the province of the Secretary of the Interior to decide that it was better to permit the minor, Eva Waters, whose general guardianship the Secretary had, to accept the sum of twenty-five thousand dollars and relinquish any claim upon her part to these two tracts of land. He had as much right to take this action and to close it without the expiration of thirty days from the time he first awarded the land to the relator as he had to make the rule in the first place that an order of his Department could be set aside within thirty days. He made such rule. There was no matter of law about it. It was simply a regulation of the Department, and it would be strange doctrine if, after putting the tenants of the relator in possession of the property, and after they had expended large sums of money in the development thereof, and after accepting the twenty-five thousand dollars for the benefit of the said Eva Waters, and after, by special telegram, ordering the chief of the Cherokee Nation to execute the deed, the Secretary can be permitted to say that he could not do any of those things which he did do until after the expiration of thirty days from the date of awarding the land to the relator. It

is a confusion of ideas to dwell upon this case in connection with the ordinary orders which are entered under the regulation of the Department, because this case, by the highest authority which exists in the Department of the Interior, was made special, closed and determined, and was not subject to the regulation that orders could be set aside or cases reopened and reviewed within thirty days.

Neither will it do to say, because Congress passed an act which said that the patents must be recorded in the office of the Commissioner to the Five Civilized Tribes, and that when so recorded they should operate to vest title, that that act in any wise ousts the jurisdiction of this court to order the writ of mandamus. Clearly the mere recording of the patent is a ministerial act; and if, under the case of *West vs. Hitchcock*, and other authorities cited, all the proper prerequisites have been complied with, and all the preliminary steps taken, whereby the relator in this case has become entitled to a patent, then it would make no difference whether there remained to be done the mere delivery of the patent, or the recording and the delivery thereof. Before that act it was the law in many instances, and with reference to many of the tribes, that the Secretary had to approve the patent. The very purpose of the writ of mandamus was to force him to do that, and that was successfully done in proper cases; and it cannot now be said that the court has lost all jurisdiction to force the Secretary to deliver a patent in any case because of the act the purpose of which was to require the patent to be recorded in the office of the Commissioner to the Five Civilized Tribes. That would be entirely a strained construction. That would be giving to the act a force and effect which was never intended by Congress.

The court has held, in the case of *United States ex rel. Belle Frost vs. Ethan A. Hitchcock*, Secretary of the Interior, at law No. 49,014, that the issuance of the certificate of allotment by the Commission to the Five Tribes puts an end to the power of segregation which the Secretary possessed

prior to allotment, and that the Secretary is without authority to set aside the allotment or to segregate the lands already disposed of by the allotment, and that he has no discretion in the matter but to deliver the patent to the petitioner. If the issuance of the certificate of allotment, which is but one of the steps in the matter of the obtaining of the patent, puts an end to the power of segregation which the Secretary possesses, can it be said that the Secretary has any further discretion after he has ordered the execution of the patent by the Principal Chief of the Cherokee Nation, and that patent has been so executed?

The gist of the decision in the Belle Frost case is to the effect that by the issuance of a certificate of allotment the power of segregation is ended, and that thereafter no discretion exists in the Secretary of the Interior. This being true, does it not follow that when the Principal Chief of the Cherokee Nation has executed a patent under the express order and direction of the Secretary of the Interior, land covered by that patent is segregated from the lands of the Cherokee Nation, and that, being segregated, the power of the Secretary of the Interior ceases, and that there remains in him no discretion in the matter, and that he must deliver that patent?

It is true that the Supreme Court of the District of Columbia did not follow the Belle Frost case, another of its decisions, but recently the Belle Frost case has been affirmed by the Supreme Court of the United States, and this case is now the law of this jurisdiction.

Ballinger *vs.* United States *ex rel.* Belle Frost, United States Supreme Court, advance sheets, page 338, published April 1, 1910.

In the case of United States *vs.* Schurz, 102 U. S., 378, a petition for mandamus was filed in the Supreme Court of the District of Columbia October 11, 1879. The facts in the case were that Thomas McBride, in 1862, was possessed of

the necessary qualifications to entitle him to preempt a quarter section of the public lands of the United States. He did so, exercising his right in the then Territory of Utah. The facts show that he performed all the essentials requisite to entitle him to said preemption; that upon his showing a patent was issued to him, October 3, 1877, and forwarded to the recorder of the local land office at Salt Lake City for delivery; that McBride had appeared at the land office and demanded the delivery of the patent; that the land officers refused to deliver it, because they had been instructed by the Commissioner of the General Land Office, October 14, 1877, to return the same; that it was returned October 22, 1878, and was in the Department of the Interior at that time, subject to the control of the Secretary of the Interior; that demand was made upon the Secretary for the delivery, and refused by the Secretary. The Secretary in his answer set up that the land in controversy was within the incorporated limits of the city of Grantsville; that the entry of McBride had been made by mistake; and then other details of the transaction follow. Upon this state of facts the court held as follows:

“From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

“It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title.

“What is this final act which closes the transaction?

“In *Marbury vs. Madison* (*supra*), this court was of opinion that when the commission of an officer was signed by the President and the seal of the United States affixed to it, the commission was complete, and the officer entitled to its possession could enforce its delivery by the writ of mandamus. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

“But we may well consider that in all nations, as far as we know, where grants of the property of the Government or of the crown are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish, and French grants of parts of the public domain purchased by us from those governments teaches us that such is the uniform law of those countries. We have already shown that under the English law all letters patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

“We are safe in saying that every State of the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

“The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the recorder, is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally perscribed act which completes what Blackstone calls ‘title by record;’ and when this is done, the grantee is invested with that title.

“We do not say that there may not be rare cases where all this has been done, and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the clerk whom the President is authorized by law to appoint to sign his name to the patent should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an es-

sential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

"But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

"No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner,—a duty which, within all the definitions, can be enforced by the writ of mandamus."

Butterworth vs. Hoe, 112 U. S., 50; *Dunlap vs. Black*, 128 U. S., 40; *Marbury vs. Madison*, 1 Cranch, 137, and *Roberts vs. U. S.*, 176 U. S., 222, are to the same effect.

Impossibility of Performance Due to His Own Act No Excuse.

The authorities are uniform to the effect that impossibility to perform on the part of a respondent, which has been brought about by his own previous disobedience or action, will not avail, since, he cannot take advantage of his own wrong. Thus *Spelling, Inj. & Ext. Remedies*, second edition, says:

"SEC. 1377. But impossibility of performance cannot be pleaded in defense to mandamus where such performance was rendered impossible by defendant's own act."

High on Extraordinary Legal Remedies, third edition:

"SEC. 14. * * * And whenever pending proceedings for mandamus and before their final determination, the obligation of the respondent to perform the act in question, or the right of the relator to exact

such performance, expires by lapse of time, the relief will be denied, since the courts will not grant the writ, when if granted, it would be fruitless. So the writ will not go when the respondent has already performed the act or the duty desired. And the relief will be withheld, when, if granted, it would accomplish no useful purpose, even though it might do no harm. And the writ will not be granted when there is no necessity for the relief and when it would be ineffectual to aid the parties aggrieved. So the relief will be withheld when the respondent offers to do the things sought without mandamus. But it is important to observe that while the impossibility of performing the act sought by the writ is ordinarily a sufficient objection to the exercise of the jurisdiction, *yet it is otherwise when such impossibility has been caused by the respondent's own act, and in such a case the courts may properly interfere, notwithstanding the alleged impossibility on the part of the respondent of doing the act in question.*"

Vol. 26, Cyc., p. 496, in discussing this question, says:

"Inability to perform, if respondent himself is not at fault and his own conduct has not caused the inability, may be a sufficient excuse. But the officer should not be allowed to escape his duty or obligation because of a failure to do that precedent act which would have insured the ultimate performance of the whole duty, at the time provided by law, and if the excuse set up is impossibility to perform, which, however, is merely a condition which the respondent has brought about by its own previous disobedience of the command of the legislature, it will not avail as he cannot thus take advantage of his own wrong."

The State of Iowa *ex rel. Dox vs. The County Judge of Johnson County*, 12 Iowa, 237:

In this case the county voted to issue certain bonds, undertaking to pay the same by the levy of a tax; the tax was not levied and the relator as the owner of a judgment recovered on some of the unpaid coupons, sought by mandamus to

compel the proper county officers to levy and collect the tax for the payment of his demand. An alternative writ was issued, to which there was no return, and thereafter a peremptory writ was ordered, to which a return was made by the county judge and surveyor that its mandate had been obeyed; whereupon they were discharged and an attachment was issued against the treasurer, returnable at the next term, at which time a further answer was filed by him, to which a demurrer was filed. The peremptory writ was served February 24, and the return of the Board of Equalization showed that on that day they complied with the writ by making a levy of the tax to pay the judgment. A further return of the treasurer, filed July 26, showed that the books were prepared with all possible dispatch and that he commenced collecting and receiving the taxes with all haste and that he had been urging taxpayers to pay up and that he stood ready to receive the same. The court said that this was not sufficient and in discussing the question says:

“The substantial question made upon the above facts is, whether it was the duty of the treasurer to proceed to collect this tax by the distress and sale of personal property, and failing this, the sale of real estate in the same manner as if the tax had been levied in 1859, and become delinquent on the 15th of January, 1860; or whether it was his duty to wait until January the 15th, 1861, before treating the same as thus delinquent. In our opinion, appellant’s position is the correct one, and that the further return of the treasurer did not purge his contempt.

* * *

“And while the command was to immediately levy and collect we are not to understand, therefore, that the collection was to be made, before the same could be accomplished by the use of legal means. * * *

“And finally, the office of this writ is to compel the party addressed to perform a duty which results from his office, trust or station (Code, 2179). The officer thus addressed should not be allowed to escape this duty or obligation, because of a failure to do that

precedent act which would have ensured the ultimate performance of the whole duty, at the time provided by law. And especially is this so when the relator, as in this case, has been prompt, in invoking the aid of court in compelling the performance of the duty required."

In the case of *The Queen vs. The Birmingham & Gloucester R. R. Company*, 2 Ad. & E. (N. S.), 47, mandamus was sought to compel the defendant to make and restore a part of a turnpike road according to the statute, the petition charging that the trustees of the road had required this to be done within a certain period, but which the company declined to do. One of the defenses raised by the respondents was that a part of the work covered by the petition had been completed; that additional land was necessary to comply with the petition, and that the compulsory powers of the company to obtain additional land necessary to widen the approaches had become extinct by lapse of time. Notwithstanding this fact an effort was made to compel the railroad to widen the approaches. Counsel for the defense stated:

"If the object be punishment, the prosecutors may indict, if there is a continuing obstruction; but to a mandamus it is a sufficient return that there is no power to comply."

Lord Denman, C. J., in deciding the case, said:

"With respect to the rest of the return, to which we have referred generally, that the company cannot now obey the writ for the reasons therein specified, we have had frequent occasion to observe that *we consider such an excuse inadmissible*. Before the company availed themselves of the very great powers with which they are vested against the public, they should take care to act strictly within those powers. As to the compulsory right of taking land, etc., [to enable it to widen a road necessary to comply with the writ] having expired, that rests entirely with the company; for, the act having passed in the year 1836,

the works in question were not begun until more than two years after, when the power was gone."

In the case of *The United States vs. Green*, 53 Fed., 769, a petition for mandamus was filed against the mayor and board of aldermen to compel them to make a levy for the purpose of paying a judgment against the city of Lathrop, Mo. An alternative writ issued which was never answered. Thereafter, on March 28, 1889, the temporary writ was made peremptory, and on the same day, but perhaps later in the afternoon, a meeting of the board was called, when its members resigned. On a motion to quash the writ of attachment for contempt issued against the respondents the court held that the resignations were abortive, and that the members of the board continued as such until their successors were qualified, and then adds:

"When the alternative writ was served on the respondents, they were brought into this court, and became subject to its jurisdiction and orders. The mandamus was made final, in fact, before their act of resignation. Their attempt to thus escape the judgment of this court was as abortive as it was ill advised. They are yet the governing board of the defendant city—*de jure*, if not *de facto*. As such, they are to-day clothed with authority to proceed and execute the mandate of this court. * * * The case of the aldermen, the other respondents, is quite different. They are not only yet in office, but, under provision of the statute governing cities of the fourth class (to which the defendant city belongs), they are authorized to elect a provisional mayor and proceed with the government of the corporation. The motion to quash the writ of attachment as to the respondent Green (mayor) is sustained, and overruled as to the other respondents; they will be committed until a levy for the satisfaction of the judgment is made."

That return of an officer stating that he has resigned and therefore made it impossible for himself to comply with a

writ of mandamus requiring certain action on his part is insufficient is also held in the cases of—

Edwards *vs.* United States, 103 U. S., 471.

Thompson *vs.* United States, 103 U. S., 431.

In *The People vs. Flemming*, 4 Denio (N. Y.), 137, an effort was made to subject certain real estate to the payment of certain judgments. It seems that the sheriff issued deed under a sale to a bank, one of the parties, whereas another party had the prior right to redeem. Proceedings in mandamus were filed against the sheriff by the latter party, who it was claimed had the prior right. *One of the defenses was that the sheriff having given a deed to the property could not give another to the relator.* In ordering a new deed to be given the court said:

“The only remaining argument which has been used against the relator is that the bank obtained a deed from the sheriff, and has since sold the land to a *bona fide* purchaser. That is a matter with which the sheriff has nothing to do. He must do his own duty and leave the purchasers from the bank to take care of themselves as well as they can. The relator must have a deed from the sheriff because he is entitled to it; and because that is the only way in which he can be put in a condition to try titles with the bank, or with any one else who may be in possession of the land. But it must not be inferred from this mode of disposing of the argument, that I entertain the opinion that a *bona fide* purchaser from the bank will be able to defend himself against the relator’s title. He will undoubtedly find it necessary to resort to the covenants in his deed.”

The case of *The People ex rel. vs. Salomon*, 54 Ill., 39, was a proceeding by attachment against the defendant for an alleged contempt in failing to obey the command of a peremptory writ of mandamus theretofore awarded. In this case the auditor of the State gave notice to the defendant as

clerk of the county court of an increased assessment of property with directions to place the same on the tax books. The clerk declined to do so on the ground that the law under which the increase was made was unconstitutional, and thereupon the auditor applied for a mandamus. To the alternative writ a return was made setting up the unconstitutionality of the law as a reason for not obeying it, but did not disclose the fact that the tax books had already been delivered by him to the township collector. After hearing, a peremptory writ of mandamus was granted. An information was then filed charging the auditor with failing to obey the mandamus. Whereupon an attachment was issued.

The defense to the attachment was that he had delivered the tax books to the township collector at the time of the return and upon receipt of the peremptory writ endeavored to secure their return, but without success, and that he did not intend any disrespect to the court, but that he proposed to have copies made of the books in order to comply with the writ. In holding the defendant guilty, the court said:

“The substance of your return is that you had delivered the books to the tax collectors, and could not repossess yourself of them for the purpose of extending the additional tax.”

“We have carefully considered this return and in our judgment it is, as a justification, open to serious objection. The first is that this fact existed at the time the alternative writ issued and should have been embodied in the return to that writ, in order that the court might have disposed of the case on a full knowledge of all the facts, and have so shaped its proceedings as to suit the emergencies of the case as it then actually stood. Instead of that, you submitted the case to the court upon the theory that the books were still in your hands or subject to your control, and thus, by your withholding the facts upon which you now rely for a justification of your alleged contempt, the court was compelled to make an order which you now say it was impossible for you to obey.” * * *

"But the main objection to the sufficiency of your answer is that you are endeavoring to excuse your disobedience to a command of the court, by setting up your own previous disobedience to a command of the legislature. You are seeking to escape the consequence of one wrongful act, by pleading that you have committed another not less wrongful. This species of defense is, in our judgment, forbidden you by that universal principle *of law which forbids a party to avail himself of his own wrong*. This maxim lies at the very foundation of jurisprudence, and is applied alike in civil and criminal proceedings. The statute required you to do a certain act. You refused to do the act, and when the agencies of the courts are set in motion by the proper officers of the State to compel you to do it you seek to escape obedience to their commands by alleging that you had so acted as to render their power ineffective, and at the same time, make yourself safe in your disobedience, by consummating your illegal act before the court had spoken."

"To allow this sort of defense to be made as a justification for disobeying the peremptory writ, would be to set all law at defiance and make the mandates of this court a byword and a jest." * * *

"The dilemma in which you are now involved, is the consequence of your failure to do this precedent act, which would have insured the collection of the tax at the time provided by law. It would be unjust, therefore, should you be permitted to shield yourself from the responsibility in this proceeding, you, yourself having created the circumstances by which you were disabled from obeying the mandamus."

"The law under which this additional tax was imposed, had passed the legislature under all the forms of the Constitution, and had received executive sanction, and became, by its own intrinsic force, the law to you, to every other public officer in the State, and to all the people. You assumed the responsibility of declaring the law unconstitutional, and at once determined to disregard it, to set up your own judgment as superior to the expressed will of the legislature, asserting, in fact, an entire independence thereof."

"This is the first case in our judicial history, in

which a ministerial officer has taken upon himself the responsibility of nullifying an act of the legislature for the better collection of the public revenue—of arresting its operation—of disobeying its behests, and placing his own judgment above legislative authority expressed in the forms of law.”

“To the law, every man owes homage, ‘the very least as needing its care, the greatest as not exempted from its power.’ To allow a ministerial officer to decide upon the validity of a law, would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same and thus an end be put to civil government, one of whose cardinal principles is, subjection to the laws.” * * *

“Your disobedience being the cause of your inability to obey the mandamus cannot, as we have said, make a justification in this proceeding, and in full accordance with this view is the case of *The People ex Rel. Dox vs. The County Judge of Johnson County*, 12 Iowa, 237.”

In conclusion the court stated that the law would not be properly vindicated by a mere admonition, and in view of the facts imposed a fine of \$1,000 with further direction that he stand committed until the fine and costs were paid. And then adds:

“Had the writ of mandamus reached you while the books were in your possession, and it had been made known to this court you had refused to extend the tax upon them, we should not have hesitated to inflict upon you the severest penalty. As it is, we are satisfied we could not do less than we have done, in vindication of the law.”

A case almost identical with this is that of the *Colorado Fuel Company vs. The State Land Board*, 14 Colo. App., 84. The facts were that the fuel company, the plaintiff, were operating certain mining lands under a lease which expired on March 23, 1897. On November 23, 1896, they filed with the State land board an application to renew the lease and

offered to pay a certain royalty, and stated that in order to properly work the mine it was necessary to do so from adjacent ground. The application was formally considered at a special meeting of the board of December 30, 1896, all of the members being present except one. At that meeting the records showed an application for an extension of the lease for ten years, and the "board ordered that upon the surrender of the said lease a new lease be granted to said company for 10 years from this date, at a minimum royalty of \$200 per annum; otherwise upon the usual terms." After the meeting the fuel company sent its check for the half year's minimum royalty of \$100, and \$1 for recording fee, which was accepted by the register; the fuel company was then notified to prepare and file the necessary bond, which was done. Subsequently a member of the board, who was then the Attorney General, for some reason not apparent, directed the register or requested him to delay the execution of the lease under the vote of the board, pending further action.

Subsequently the Victor Coal and Coke Company offered to lease a part of the land involved and to pay a minimum royalty of \$1,000 a year. Matters were delayed until June, 1897, when in some way the lease was put up at auction, and the Victor Coal and Coke Company bid \$41,000 as a minimum royalty, which, being the largest sum offered, was accepted and the lease executed to them. The fuel company constantly protested and insisted on the execution of the lease, but the board declined to do anything, since its personnel in 1897, with the exception of the Attorney General, was not the same as that in 1896, which had voted for the lease. It was the new board that undertook to reverse and set aside the action taken by the land board and to issue a new lease. There was no offer to return to the fuel company its check or the money which it had paid until some weeks after its receipt, and not until the latter part of March, 1897.

On failure of the board to execute this lease, the fuel company by mandamus sought to compel its execution. Upon hearing the lower court denied the application for the writ.

In the statement of facts the court says:

“While this suit is nominally a proceeding by way of mandamus to compel the State Land Board to issue a lease to the Colorado Fuel and Iron Company for coal-mining purposes, on certain lands belonging to the State, we are quite well able to see from the record that it is in reality and in substance a controversy between the Colorado Fuel and Iron Company under their claim of right to this lease as against the Victor Coal and Coke Company, which holds a lease from the State, issued by the Land Board to the same section.”

One of the defenses raised was that of impossibility of performance, since a lease had been made to a third party.

The entire question is very carefully considered and the entire opinion supports relator's contention in the case at bar. The court says (p. 93):

“It was adjudicated that this proceeding might be initiated as against this particular board, to wit, the State Land Board, and wherever their discretion had already been exercised, and there was nothing left to be done but to execute an instrument, this was an act ministerial in its character, the writ could issue, and thereon judgment might be rendered compelling them to perform, a case being otherwise made out by the applicant (citing cases).” * * *

(Page 94:)

“As preliminary to this question it may be well to dispose of a suggestion made by counsel on the argument, that the board had executed another lease to the Victor Coal and Coke Company which is outstanding, and that, therefore, they should not be compelled to execute another paper which would be antagonistic and perhaps involve the board and third parties who are not before the court with respect to their rights. We do not believe the position to be well

taken and it is undoubtedly true, and has been many times held that where rights of third parties are involved, mandamus will not ordinarily lie, but parties must proceed by bill in equity, bringing those parties in, and in the suit thus initiated have their rights litigated and determined. We are quite of the opinion this case is not at all similar or in its facts analogous to those wherein this principle has been enunciated. As we view it, if we ultimately conclude what the Land Board did amounted to a contract between them and the Fuel and Iron Company, the subsequent lease executed to the Victor Coal and Coke Company, was wholly invalid, they acquired no rights thereby and they are not prejudiced by these proceedings.

“Again, it is equally true *it is not for the Land Board*, which counsel insist is the only party represented, *to contend that the Victor Coal and Coke Company are not before the court, to say that they have executed another lease, nor to contest the use of this remedy because of this fact, if it be one. It is not enough for a party to insist that it is impossible for him to perform the act where this impossibility has been occasioned by his own doing.* Where it is the respondents’ own act which creates the impossibility, he may not plead it as a defense to the writ and the enforcement of the right. This is the general principle asserted by all text writers, and is recognized by this court in the *First National Bank of Northampton vs. Arthur*, 12 Colo. App., 90. * * *

“They reached a conclusion and expressed it in their record and according to it, the board ordered that on the surrender of the old lease a new one should be granted for 10 years at a minimum royalty of \$200, and otherwise upon the usual terms, reciting in their record that the old lease was numbered 5244. Thereupon the Fuel and Iron Company paid its half year’s royalty by transmitting its check for \$100, the amount of it with \$1.00 for recording fees, which were accepted by the proper officer of the State Land Board and never returned or offered to be returned until several months afterwards and the happening of the circumstances which gave rise to this controversy.

The only thing then to be done was the formal execution of the lease. Its terms were agreed on. The term was stated. The royalty was specified. The former lease was referred to, the general conditions of which would necessarily be the general conditions of the new lease in the absence of other agreement. They were not entirely established by proof and the appellant should have offered proof respecting the usual conditions of mining leases and this might have been essential for the purpose of a just expression of their rights by decree. We do not believe, however, that the absence of this proof is enough to warrant us to affirm the judgment when otherwise we conclude the judgment is entirely wrong with respect to the fundamental questions on which it rests. This being the situation it seems to us very clear, that when all these facts, circumstances, papers and records are taken into consideration, there is enough thereon and therein to make a complete and specific contract between the parties and vesting a right in the Colorado Fuel and Iron Company which they have a right to enforce and which can only be effectuated by the mandamus proceedings which were adopted. The absence of a formal paper, to wit, a lease, is not enough to debar the lessees or to prevent the enforcement of their right as between them and the State Land Board. As between private individuals, this has been adjudged enough. *Post vs. Davis*, 7 Kansas App., 217.

Petition to Dismiss.

Appellee has filed in this case a petition to dismiss or affirm, and a brief thereon, the major portion of which is a discussion of the merits of the controversy, and because of the decision of the court below thereon in favor of appellee the present appeal is prosecuted. In other words, it is, in effect, a brief upon the merits of this appeal as supplemental to this brief. The main proposition is hereinbefore discussed at length. In effect counsel has filed two briefs upon the merits of this controversy, one printed and the other not.

Two points, however, have been raised in the present motion which were not presented to the court below, and will hereafter be discussed.

Allegation that Appeal Should be Dismissed Because Appellant has Abandoned the Claim to His Allotment.

The motion to dismiss avers that since this appeal was taken, to wit, on February 3, 1910, appellant has waived his claim to the allotment involved in this appeal by asking to have allotted to him other lands to make up the full amount to which he is entitled under the law. While assuming that the statement contained in the motion is correct, counsel for appellant has personally no knowledge of the same, but irrespective of this fact this court should decline to entertain the motion for two reasons, to wit:

(a) The information contained in the motion is not a part of the record transmitted to this court.

(b) The land involved in this appeal having been allotted to appellant and deed therefor having been executed by the Chief of the Five Civilized Tribes, and the value thereof as fixed by appellee having been turned over to the United States and still held by it, appellee has no right under the law to allot appellant other and different lands from those involved in this suit.

No Bill of Exceptions Necessary.

This case was tried by the court below without a jury upon the pleadings as appears from its decree (R., p. 106). It is true that considerable evidence appears in the record as taken for the appellant, but the court declined to admit the same in view of the supplemental answer setting up

the fact that a deed for the lands here involved had been delivered to Eva Waters, thereby making the question involved a moot one.

The cases cited in the briefs of appellee do not justify the inference sought to be made. Those cases all say that the entries in the minutes of the clerk or judge are not the equivalent of a bill of exceptions, but in effect hold that where the question of law involved appears from the pleadings and record properly before the appellate court, that such court will entertain the same.

The decree itself rendered by the court below (R., p. 106) is not the equivalent of the minutes, but is the formal decree and order pursuant to which the petition was dismissed. This decree sets forth that the court declined to admit the depositions offered by the appellant over exception. It also appears that the deed offered by appellee was admitted by the court over appellant's exceptions. What more could any bill of exceptions present, and could anything be more formal than the final decree of the court, specifying upon what the court reached its conclusion

This appeal is based upon the record as made up of the pleadings and the decree, and they, in themselves, without any evidence, raise the questions of law involved. No bill of exceptions could state more positively or definitely the questions of law raised than found in this record.

Mansfield vs. Winter, 10 App. D. C., 549, 555, was an action of assumpsit to which pleas were filed, issue joined and jury trial had with a verdict for the plaintiff. An appeal was taken on the naked record with no bill of exceptions. In taking jurisdiction, Chief Justice Alvey said:

"There was no motion in arrest of judgment, nor was there any bill of exception signed. But the case is brought here by appeal on the naked record as we have recited it. And the question is, whether there is anything apparent upon the record that requires this court to review and reverse the judgment from which the appeal is taken.

"It is true, as contended for the appellee, that questions not affecting the jurisdiction of the court below, or its power to render judgment upon the case stated for its action, will not be entertained by this court, under section 3 of rule V of this court, unless they appear to have been fairly presented for decision by the court below. * * *

* * * * *

"But this reason of the rule does not apply to the case where the declaration states a case not within the jurisdiction of the court, or which wholly fails to show any such legal cause of action upon which a valid judgment can be rendered. In such case, the declaration itself presents the question, and the court must be assumed to have taken notice of the case as therein stated when called upon to render judgment."

Slacum vs. Pomery, 6 Cr., 221.

McAllister vs. Kuhn, 96 U. S., 87.

Cragin vs. Lovell, 109 U. S., 194.

Moline Plow Co. vs. Webb, 141 U. S., 616, 623.

In Insurance Co. vs. Plaggeer, 16 Wall., 378:

"Whenever the error is apparent in the record the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment, or execution of a suit in a court of record."

The case of *Clinton vs. Missouri Pacific R. R.*, 122 U. S., 469, was an action by the railroad to condemn certain land, in which a commission was appointed to make an assessment of damages. One of the errors assigned on the appeal in the Supreme Court was that the question of the dismissal of the appeal below was not presented by a bill of exceptions, and that there was nothing in the record on which the court could review the decision. As to the proposition that it can-

not be reviewed for want of a bill of exceptions, the court said:

"A judgment of a court appealed from is never incorporated into a bill of exceptions. It is always a part of the record of the case, and, like the plea and the verdict, it needs no bill of exceptions, but is simply to be transcribed as a part of the record. In this case it presents for itself the point or matter on which the court acted. It is there distinctly stated that the case was dismissed because the appeal was not taken within sixty days from the date of the assessment of damages made by the commissioners. Now, if the facts on which this decision was made are to be found in what may be properly called the record of the case before the judge when he decided it, as it is here presented to us, then there was no need of any bill of exceptions in the matter."

In *Solomon vs. Davenport*, 87 Fed., 318, the court said:

"At the hearing before this court counsel for petitioners entered a motion to dismiss the appeal because no exceptions were taken at the trial, and because no bill of exceptions appears in the record disclosing the evidence then heard. Section 763 of the Revised Statutes of the United States provides that an appeal shall lie from a decree in the district court in cases of *habeas corpus*. And the act established in this court makes provision also for an appeal in like cases. No bill of exceptions is required in cases brought here on appeal. Besides this, the errors assigned are matters appearing in the record and in such cases no bill of exceptions is necessary."

In *City of Wilmington vs. Ricard*, 90 Fed., 221, the court said:

"The errors complained of are errors, if any, patent on the record. There is no disputed question of fact or any ruling on any question of fact. The only question in the case is one at law. No bill of exceptions is necessary."

In *Territory vs. Brown*, 7 New Mex., 568:

“The refusal of a peremptory mandamus on an alternative writ and answer may be reviewed on appeal or error, when the petition and matter upon which it is based are in terms made part of the writ, although no motion for a new trial had been made in the court below, and no bill of exceptions filed.”

The authorities are numerous to the effect that wherever the error is apparent in the record the court will take jurisdiction irrespective of the fact that there may be no bill of exceptions.

Chester vs. R. R., 122 U. S., 469, 474.

R. R. Company vs. Trustees, 91 U. S., 127, 130.

Garland vs. Davis, 4 How., 131, 146.

Sudham vs. Williamson, 20 How., 427.

Young vs. Martin, 8 Wall., 354.

Rogers vs. Burlington, 3 Wall., 654, 661.

Scaide vs. Western N. C. L. Co., 87 Fed., 308, 311.

Moline Plow Co. vs. Webb, 141 U. S., 616.

Question Not a Moot One.

This can in no sense be deemed a moot question for the reason that if appellant's position is correct, then appellee had no warrant or authority of law to issue the deed to Eva Waters, and such deed is of no force or effect. That this position is borne out by the authorities is hereinbefore discussed. In the case of *Colorado Fuel Co. vs. Board*, 14 Colo. App., 84, the court held that it was a matter of no consequence that a lease had already been delivered to a third party, and directed that a lease be issued to the party properly entitled thereto. If, therefore, this court shall order appellee to deliver the patent to appellant, then the local courts of Oklahoma will pass upon the issue as to which deed is the valid one and properly entitles the holder to the land. Appellee assumes that his mere action in nullifying

the power of the court below by issuing the deed to Waters takes away from the court the power by mandamus to compel him to deliver a deed, and that therefore he cannot be compelled to do his duty in the premises.

This question is not a moot one for the reason that appellant had a vested right in the land and a deed therefor had actually been signed. The petition sets forth the fact that a contest was instituted in the office of the Commissioner of the Five Civilized Tribes between the said Eva Waters and the appellant, then on appeal before the Commissioner of Indian Affairs, and thereafter on appeal to the Secretary of the Interior; that the appeal upon the said contest culminated on May 10, 1909, in a decision by the Secretary of the Interior awarding the land to appellant, as appears in his telegram dated May 11, 1909, to the Acting Commissioner at Muskogee, wherein he stated that the land in Twist and Knight cases against Waters will be awarded to him upon the payment of \$25,000 for the use of Waters, provided that payment of an additional sum of \$13,000 to that already paid is made prior to the 15th of May, 1909, making a total of \$25,000, and that when the entire fund was received deeds were to be prepared and executed and forwarded to the Department. The appellant complied with all the requirements imposed and made the payment as directed and within the time specified (R., p. 22).

Therefore appellant had a clear vested right to the said property and to the deed therefor. The Supreme Court in the case of *Ballinger vs. Frost*, which recently affirmed the decision of this court, held:

“Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a Department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation.”

The court refers to a number of cases holding that the mere issuance or delivery of the patents after the right to it is complete are the mere ministerial acts of the officers charged with the duty, and cites, among others, *Barney vs. Dolph*, 97 U. S., 652.

A contest had therefore been declared, had by appeal reached the Secretary of the Interior and been decided in favor of the appellant, who complied with the requirements of the Secretary and turned over to the representative of the Government for the two tracts of land \$25,000, of which a large part was for the appellant and which is still retained by the United States.

Furthermore, it appears that the deed was actually signed and executed by the Chief of the Five Civilized Tribes and forwarded to the Secretary for approval. This clearly left no discretion in appellee but the simple ministerial duty of approving and delivering the deed. This being so, the question is not a moot one.

The respondent sought to retain the benefit of the allegations of his original answer and at the same time plead a fact which arose since the return to the writ in this case. This he cannot do.

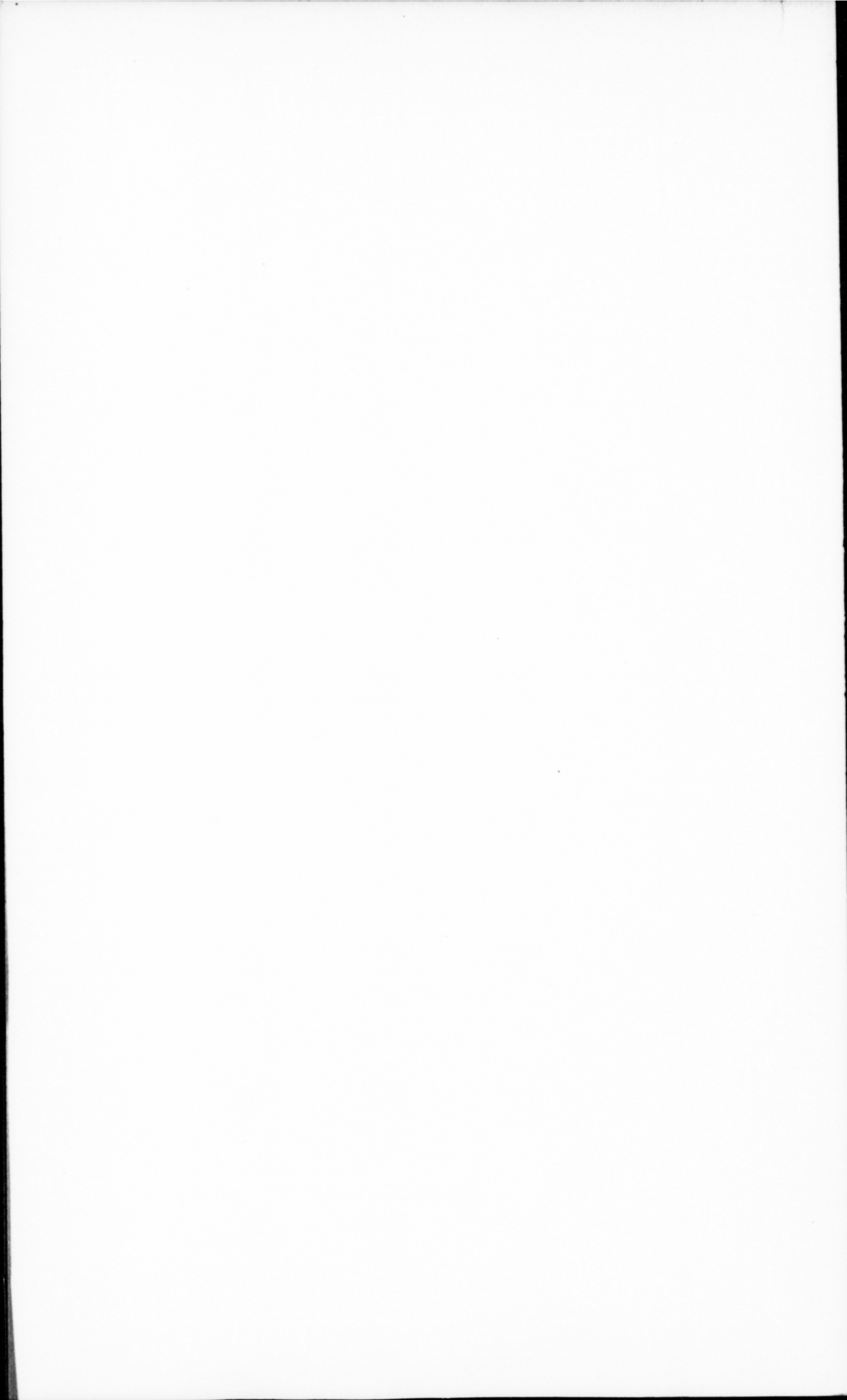
Thompson vs. United States, 103 U. S., 435.

Perhaps the trial court was correct in holding that under the practice in the District of Columbia the so-called supplemental answer was equivalent to a plea *puis darrain* continuance. This is what was held in effect as shown by the judgment (Record, page 106). This cannot be controverted, because the only thing which the trial court considered was the averment of the issuance of the patent to Eva Waters after the joinder of the issues in this case. The judgment in this case runs; thereupon, after due consideration by the court, it is adjudged that the rule to show cause be discharged and that the prayer of the petition be denied and the petition dismissed. There was ab-

solutely nothing further for the court to consider except a patent to the land in controversy issued to a person other than the appellant after the issues in this case were joined, which was offered by the respondent over the objection of the appellant, to which action of the court the appellant excepted. That the fact upon which the court rests its decision could not have been pleaded and proved in any other manner than by the interposition of a *puis darrain* or its equivalent was settled by the Supreme Court of the United States in the case of *Thompson vs. The United States*, 103 U. S., 435. It is respectfully submitted that the fact of the subsequent deed is as a matter of law ineffectual as a defense, and the proper course is for this court to enter a judgment here in favor of the appellant and directing the delivery by the respondent of the deed to the land in controversy to him. The assertion in the plea by the respondent that he reasserts and reaffirms all of the allegations of his original answer is wholly valueless. He is bound by the rule of law which governs the interposition of a plea of fact arising since the return to the writ of mandamus and the joinder of the issues, and his notions about reiterating, reaffirming and reasserting the allegations of his answer in a plea of the character under consideration are not important. The necessary effect of the pleading of the subsequent fact, and in this case it is upon that fact alone that the judgment rests, is an abandonment of all other pleas in the case. Hence this court should order the Secretary of the Department of the Interior to deliver the deed to the land in controversy to the appellant, which was the purpose of this suit. Read the judgment. It is very short. It is found on page 106 of the record. The judgment refuses consideration to all of the evidence of the appellant under the original issues joined. It took under consideration nothing but the deed issued to a person other than the appellant after the issues were joined. Hence it is squarely presented to this court whether or not the Secretary of the Department of the Interior can by his own act, after

the return to the rule to show cause why a mandamus should not issue to compel him to deliver a certain deed, render nugatory any inquiry of the court as to the validity and merit of the appellant's contention as set forth in his petition. If the Secretary can be permitted to determine these matters for himself we will be called upon to witness, in the language of the Supreme Court of the United States, the "unseemly spectacle" of the Secretary determining for himself that which the jurisdiction of the court was invoked to adjudicate. The Secretary should by this court be ordered to deliver the patent as set forth in appellant's petition, and he, having elected to rely upon his act subsequent to the joinder of issues, cannot now be heard to complain that he in law is deemed to have abandoned any other issue than that of his subsequent act done.

BRANDENBURG & BRANDENBURG.
ZEVELY, GIVENS & SMITH.



COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED
MAY 3-1910

*Henry W. Hodges,
Clerk.*

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1910.

No. 2138.

No. 15, Special Calendar.

UNITED STATES OF AMERICA, EX REL. HERMAN KNIGHT,
APPELLANT,

v.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

OSCAR LAWLER,

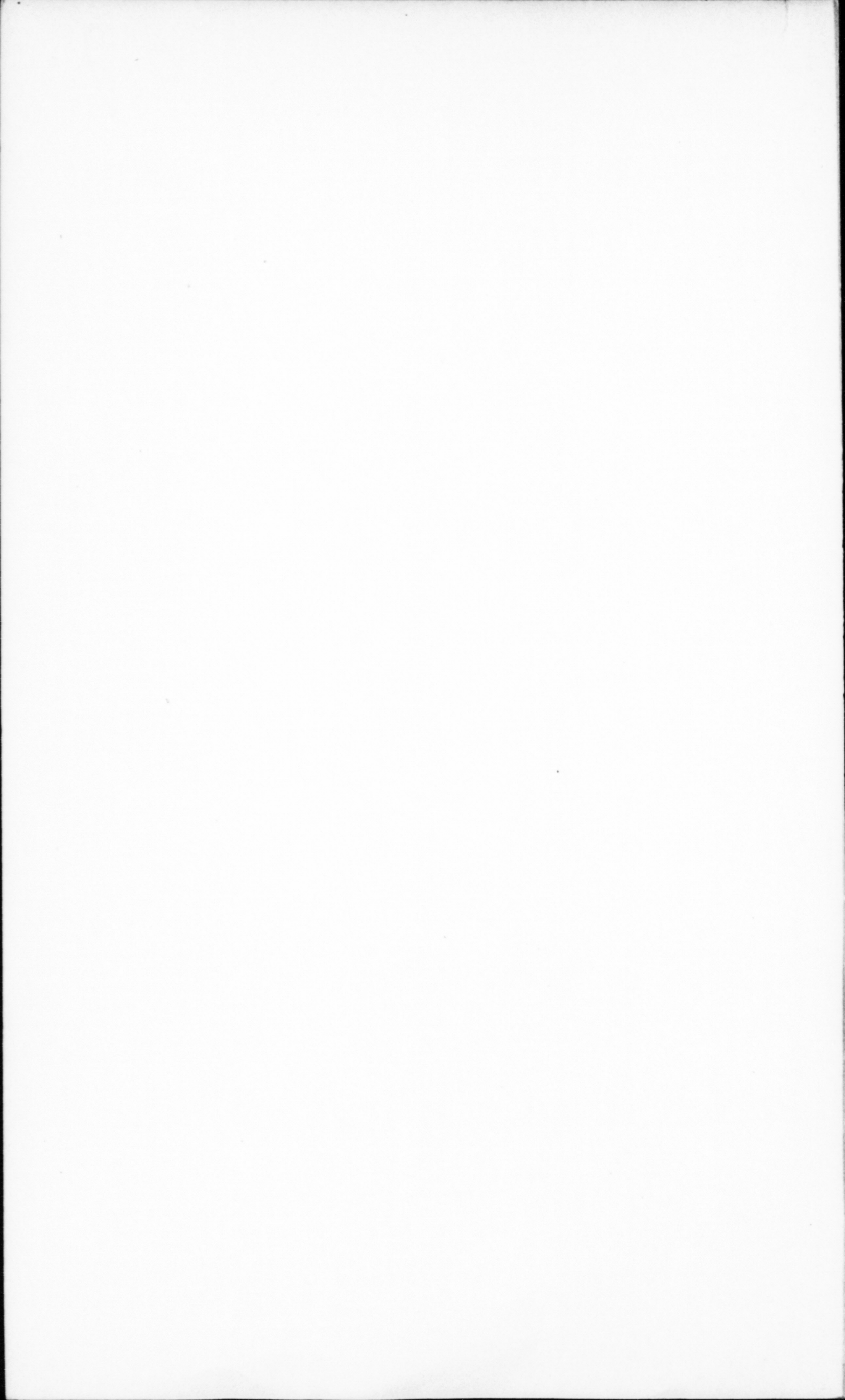
Assistant Attorney-General.

F. W. CLEMENTS,

First Assistant Attorney.

C. EDW. WRIGHT,

Assistant Attorney Interior Department.



In the Court of Appeals of the District of Columbia.

APRIL TERM, 1910.

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| UNITED STATES EX REL. HERMAN Knight, Appellant, v. RICHARD A. BALLINGER, SECRETARY OF the Interior. | } | No. 2138. No. 15, Special Calendar. |
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*APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.*

BRIEF FOR APPELLEE.

The Commissioner to the Five Civilized Tribes, under the supervision of the Secretary of the Interior (supervision being ordinarily exercised through ultimate appeal to the latter), is, by section 22 of the act of July 1, 1902 (32 Stat., 716), charged with exclusive jurisdiction over the matter of allotments to individual members of the Cherokee tribe or nation of Indians. (Record, p. 19.)

Eva Waters and Herman Knight, citizens of said nation, and, as such, entitled to allotments of land in said nation, asserted claims to the same parcel of land, and appellant inaugurated a contest before said commissioner to determine the matter. (Record, p. 2.) Said contest was pending and hearing thereof had been fixed for July 19, 1909, when appellant, on July 16, 1909, filed his improperly verified petition for mandamus (record, pp. 1-5) to compel the issuance to himself of a deed to the land in controversy. On said July 19, 1909, the contest came on regularly to be heard before the Commissioner to the Five Civilized Tribes (record, .

p. 30), appellant participating therein by counsel (record, p. 31), and the commissioner awarded the land to Eva Waters. (Record, p. 31.) Under the rules of practice of said Interior Department relating to such proceedings, appellant was allowed thirty days within which to appeal; this he failed to do, and, on August 18, 1909, the decision under such rules, became final. (Record, p. 31.)

On August 21, 1909, the principal chief of the Cherokee Nation, pursuant to said decision and the duty imposed by law (sec. 58, act July 1, 1902, 32 Stat., 725), executed a deed or patent to the land to said Eva Waters (record, p. 104), the effect of which was to convey to the latter all the right, title, and interest of the Cherokee Nation in said land, and, on August 25, 1909, the Secretary of the Interior approved the same (record, p. 105), as required by section 59 of said act of July 1, 1902, which approval operated as a relinquishment to the grantee of all the right of the United States in and to the land embraced in the patent and placed the same beyond the jurisdiction and control of appellee.

No allotment certificate was ever issued to appellant (record, p. 19).

In the meantime, and on July 14, 1909, appellee gave notice that he would, on July 23, 1909, move to dismiss said petition for mandamus. On the latter date appellant filed an amended petition properly verified, demanding, however, the same relief as prayed for in the original petition (record, p. 21). Appellee had already prepared answer to the original petition, which by stipulation was filed and considered as an answer to the amended petition (record, p. 24). Appellant made replication and issue was joined July 30, 1909 (record, p. 29).

Certain depositions were taken by appellant and filed September 2, 1909 (record, p. 32 et seq.), but, as above stated, before that date, and on August 18, 1909, judgment in favor of Eva Waters had become final and title passed.

On September 1, 1909, appellee filed supplemental answer (record, p. 30), in which was set forth the hearing and decision in the controversy between Knight and Waters, appellant's failure to appeal, and the finality thereof, the delivery and approval of deed, as aforesaid, and—

that by reason and on account of the execution and delivery of said deed as hereinabove set forth, the said Department of the Interior has not, nor has any officer thereof, any power, authority, or jurisdiction over the land above described, nor has said Department of the Interior, or any officer thereof, any duty, right, or authority to execute or deliver, or cause to be executed or delivered, any conveyance covering the said property to the relator herein or to any other person.

After some sparring between the parties, by way of motions to dismiss and to strike out the supplemental answer, appellant demurred to the latter, which being overruled, he filed replication thereto, October 25, 1909 (record, p. 102). Issue was joined (record, p. 103), and, responsive to appellant's motion to set the cause for hearing (record, p. 103), the case was heard on the pleadings, December 13, 1909 (record, p. 106). At the hearing objection to appellant's offer of the depositions above mentioned was sustained, but the court received and considered the patent, set forth on page 104 of the record, and discharged the rule to show cause, denied the prayers of the petition, and dismissed the same with costs (record, p. 106).

ARGUMENT.

At the outset the court's attention is called to the fact that there is no bill of exceptions in the record herein, and therefore no question properly presented for review. (Rule V, par. 4, Rules of Practice; *Brown v. Ins. Co.*, 21 App. D. C., 325.)

The case is therefore not properly before this court for review for want of a bill of exceptions certifying to the court what was done and ruled on the trial below, and we should in strictness dismiss the appeal or enter the judgment below affirmed; for it is very clear we could not in justice to the court below proceed to review and reverse the judgment upon the state of the record as now presented. (*Frizzell v. Murphy*, 19 App. D. C., 440.)

The entries on the judge's minutes upon the trial, which usually state the exceptions then taken and allowed, are not bills of exceptions, but evidence of the party's right to the same. (2 Foster's Federal Practice, p. 1316; *Pomeroy's Lessee v. Bank*, 1 Wall., 592.)

See also *Balt. & Pot. R. R. Co. v. Trustees, etc.* (91 U. S., 127, 130); *Young v. Martin* (8 Wall., 354, 356); *Williams v. Norris* (12 Wheat., 119).

However, the court committed no error. The depositions offered in evidence, as will appear by inspection, in no way controverted the matter set forth in appellee's supplemental answer which was traversed by the appellant (record, p. 102). They present not a tittle of evidence germane to the issue made by the joinder (record, p. 103). On the other hand, the patent (record, p. 104) not only furnished direct substantiation of the averments of the supplemental answer, but was proper matter to be considered by the court under any circumstances, showing, as it did, that the granting of appellant's petition would be entirely ineffective.

It is the universal practice of courts of justice to dismiss a case whenever an event has occurred which renders it impossible for the court to grant any effectual relief in favor of the plaintiff. (2 Enc. U. S. Sup. Ct. Rep., 289-292.)

In the instant case, at the time of the filing of the original bill, the proceedings provided by law for the determination of conflicting claims to particular tracts of land were still pending; consequently appellant had not exhausted his remedy before the department and was not entitled to the writ; in due course such proceedings were concluded, and the land involved was awarded to appellant's adversary; by acquiescence (failing to appeal) of appellant, that decision became final, and deed to Waters was regularly issued, approved, delivered, and recorded August 27, 1909, thus severing all claim of the Cherokee Nation and the United States to the land and removing the same from the jurisdiction or control of the United States or any officer thereof. (Record, p. 105; act of April 26, 1906, sec. 5, 34 Stat., 138.) Not a thing was left for a judgment in favor of appellant (if such a thing were possible) to operate upon; not a thing was left for the court's consideration save the idle, moot, and hypothetical question as to whether, in appellant's petition, there was presented a situation which would justify interference with quasijudicial processes of a coordinate branch of the National Government, if there were existing any subject-matter upon which judicial process might operate.

Even should the court have rendered judgment as prayed for, and had the Secretary, pursuant thereto, have issued another deed, the appellant would not have been aided in any way—he would have been required to go into the State court and try out the question of title exactly as he had, and still has, the right to do without such deed.

Aside from the proposition that the court could not, by its judgment, legitimately affect or impair the rights of Eva Waters, a stranger to the record, who had, by the proper tribunal, been awarded the land in the method prescribed by the law, it is submitted, as contended in and held by the court below, that it appeared upon the face of the pleadings that there was presented a mere abstract, moot question, and the dismissal was not only proper, but mandatory.

A judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions, or to declare principles of law which can not affect the issue before it. (*Cardoza v. Baird*, 30 App. D. C., 86.)

See also *United States ex rel. Gannon v. Georgetown College* (28 App. D. C., 87); *Wilson v. Shaw* (204 U. S., 24); *Security, etc., Co. v. Prewitt* (200 U. S., 446).

As heretofore indicated, appellant has not been deprived of any substantial right. He still has his remedy, if entitled to any, by recourse to the courts of Oklahoma, where the land is situate and where the only parties interested reside.

But, for this court, we respectfully submit, the appeal presents exactly what was before the lower court—naught but a moot question.

Appellant, since the appeal was noted, has abandoned this claim to the land involved herein, and has selected other land in allotment in an amount practically exhausting his right to lands in said nation. The average appraised value of an allotment in the Cherokee Nation has been fixed at \$325.60. (Tenth Annual Report of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior, * * * 1903.) Excluding the land involved in this suit, appellant prior to notation of appeal had selected land of the total appraised value of \$205.12, leaving \$120.48 in land still due him. On February 9, 1910, appellant selected

land to the value of \$116. His application is in words and figures following:

WILLMAR, MINN., *February 3, 1910.*

The honorable the COMMISSIONER
TO THE FIVE CIVILIZED TRIBES,
Muskogee, Oklahoma.

DEAR SIR: There is yet due me to complete my allotment of land in the Cherokee Nation, a balance of \$120.48 and I hereby request the honorable Commissioner to the Five Civilized Tribes to cause to be allotted me land equal in value to the balance due me to complete my allotment as a citizen of the Cherokee Nation and I request that the following land be allotted to me, to wit:

NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 27, T. 24 N., R. 24 E.
S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of sec. 26, T. 24 N., R. 24 E. If the above-described land be allotted my second choice is the following:

E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of sec. 26, T. 24 N., R. 24 E. NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of sec. 26, T. 24 N., R. 24 E. SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of sec. 26, T. 24 N., R. 24 E.

My third choice would be the following: E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ sec. 36, T. 23 N., R. 24 E. S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ sec. 35, T. 23 N., R. 24 E. In the event the above land is taken my next choice would be lot 6, sec. 6, T. 23 N., R. 24 E. N. $\frac{1}{2}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 35, T. 23 N., R. 24 E.

Yours, very truly,

(Sgd.)

HERMAN KNIGHT.

WILLMAR, MINN.,
February 3, 1910.

Honorable COMMISSIONERS:

Please let me know just as soon as I am allotted and upon which of the pieces, as I want to have some improvements put on same at once.

Hoping to hear from you at an early date, I am, very truly, yours,

(Sgd.)

HERMAN KNIGHT,
Willmar, Minn.

C/o Commercial Hotel.

This is to certify that I am the officer having custody of the records pertaining to the enrollment and allotment of lands to members of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations, and that the above and foregoing is a true and correct copy of a

letter from Herman Knight, dated February 3, 1910, requesting the allotment of certain land to him as a portion of his proportionate share of the tribal property of the Cherokee Nation.

(Sgd.) THOMAS RYAN,
Acting Commissioner to the Five Civilized Tribes.

MUSKOGEE, OKLAHOMA, *April 11, 1910.*

The application was allowed, as shown by a plat bearing the following indorsements:

Herman Knight—16760. Surplus. NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of sec. 27-24-24. Less 2 ac. applied for by school dist. No. 20. S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of sec. 26-24-24. Filed Feb. 9, 1910.

No contest.

Appraised value of land indicated, \$116.00.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the official allotment plat showing the allotment selection of Herman Knight in secs. 26 and 27, T. 24 N., R. 24 E., in the Cherokee Nation.

THOS. RYAN,
Acting Commissioner to the Five Civilized Tribes.

MUSKOGEE, OKLAHOMA,
April 11, 1910.

This practically exhausts his right. Under section 7 of the act of May 27, 1908 (35 Stat., 315) the right of appellant to the land has become absolute, sixty days having expired since application to allotment was filed and no contest having been instituted, as certified by the Acting Commissioner to the Five Civilized Tribes.

OSCAR LAWLER,
Assistant Attorney-General,
F. W. CLEMENTS,
First Assistant Attorney,
C. EDWARD WRIGHT,
Assistant Attorney,
Attorneys for Appellee.

COURT OF APPEALS.
DISTRICT OF COLUMBIA
FILED
MAY 10 1910

Henry W. Hodges,
clerk.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1910.

No. 2138.

No. 15, Special Calendar.

UNITED STATES OF AMERICA EX REL. HERMAN KNIGHT,
APPELLANT,

v.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

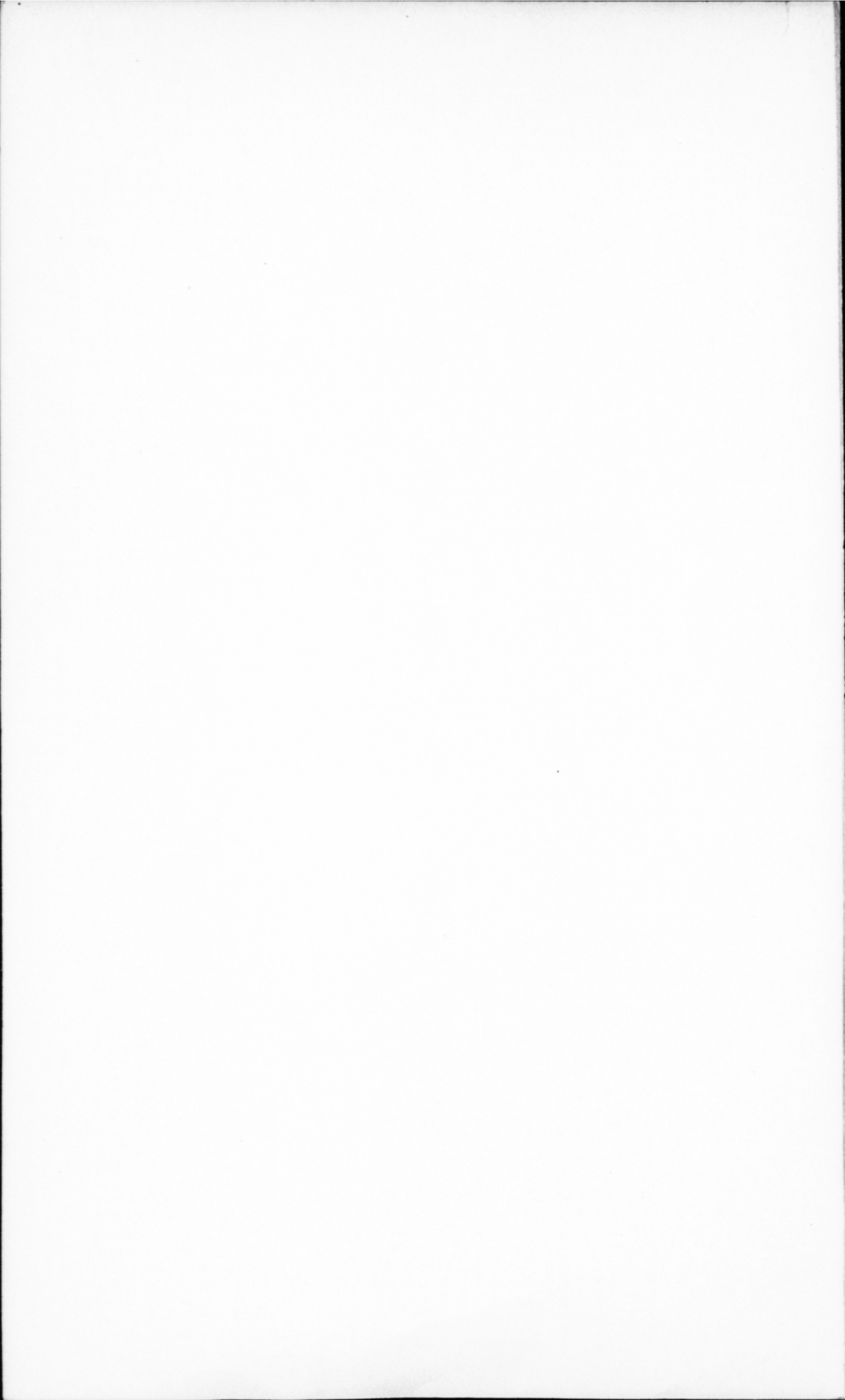
APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR APPELLEE.

OSCAR LAWLER,
Assistant Attorney-General.

F. W. CLEMENTS,
First Assistant Attorney.

C. EDW. WRIGHT,
Assistant Attorney Interior Department.



In the Court of Appeals of the District of Columbia.

APRIL TERM, 1910.

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| UNITED STATES EX REL. HERMAN Knight, Appellant, v. RICHARD A. BALLINGER, SECRETARY OF the Interior. | } | No. 2138. No. 15, Special Calendar. |
|---|---|--|

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.*

REPLY BRIEF FOR APPELLEE.

Appellant's brief does not seriously controvert the contention made on behalf of appellee. Appellant's argument that the case is not a moot one because respondent's "impossibility of performance due to his own act (is) no excuse," is inapplicable. If the court will carefully examine the cases cited by appellant, the fact will become manifest that there is a decided and fundamental difference between the acts committed in those cases and in the one at bar. The Colorado Fuel Co. case (14 Colo. App., 84) is the only one at all illuminating; but there the court was dealing with parties to a contract completed in all respects save form, wherein one party attempted to defend its breach of the undertaking by pleading that it had since executed a lease to another party. In the case now under consideration, the appellee acted pursuant to a legal duty in his quasi judicial capacity, deciding a matter in dispute between two litigants. Misled by false

representations, he proceeded to permit one party to withdraw from the controversy, leaving the field clear for her adversary. Immediately upon sending the telegram of May 10, 1909, stating that the land "will be awarded" to Knight (Record, p. 16), the parents and personal guardian of the minor party who was permitted by said order to withdraw protested by wire against his action (Record, p. 18). The land was not awarded to Knight, however, because of said protest and the discovery that the telegraphic direction had been induced by gross misrepresentation as to the value of the property. Said protest was followed by a motion for review of the Assistant Secretary's action, announcement of intention in that respect being made in the presence of the relator's counsel, who thereafter appeared and participated in the proceedings on review (Record, pp. 34-35). In two recent cases decided by the supreme court of this district (*U. S. ex rel. Clark v. Ballinger* and *Phillips v. Ballinger et al.*) decisions adverse to the defendant were predicated solely upon the proposition that the rules and regulations of the Interior Department bound the Secretary as well as litigants. Mr. Justice Anderson decided the Phillips case. As the rules of practice gave thirty days in which to move for review, the minor's rights could not be finally disposed of until that time had elapsed after May 10, 1909, or until it had been affirmatively indicated that no review would be sought.

Now, within said thirty days allowed by the rules (Record, p. 9) the parents of Eva Waters did file a motion for review. What happened is related on pages 18 and 19 of the Record. Relator appeared by counsel and resisted the motion, not by plea to the jurisdiction of the appellee, but upon the merits of the case. June 24, 1909, decision on this motion was rendered against the appellant. The effect of that decision was to restore to its proper place before the Commissioner to the Five Civilized Tribes the contest between appellant and Eva Waters. It must at all times be borne in mind that there had been no trial before the department on the merits of the contest between appellant and Eva Waters. (Decision attached to appellant's petition as Exhibit C, p. 11 of Record.) The most that had been done was merely to grant permission to appellant to institute the contest proceeding (Record, p. 16). That cause came to trial in regular course with the result

described in our first brief. In due course, the land was awarded to Eva Waters, and she became entitled to receive, and did receive, a patent. The proceeding was regular; the jurisdiction of the Commissioner to the Five Civilized Tribes, under the supervision of the Secretary, was complete—exclusive, for that matter; and neither he nor the appellee was under the restraint of any injunctive process.

Thus, far from resembling the Colorado Fuel Co. case, this case bears a more marked resemblance and close analogy to the Cardoza case (30 App. D. C., 86). Here, as in the latter case, the court's interference with the exercise of quasi-judicial functions was sought—in this case, that of the Secretary of the Interior; in the Cardoza case, that of the local school board. In the Cardoza case, the court below refused an injunction and Cardoza appealed. The school board, in spite of the appeal, proceeded to try Cardoza and to dismiss him. The board was not enjoined and therefore could act, even if respect for the Court of Appeals might have deterred it from acting until the court had an opportunity to pass upon the question involved. In the case now on appeal, the appellee was not enjoined; and he did show his respect for the court by duly notifying the court below that the exigencies of the situation demanded immediate action.

The situation was peculiar. As was suggested on oral argument, here was an oil company operating oil wells on tracts contiguous to the land involved in this case; if appellant secured the land, the company would get the oil by leasing the property. But in the event that Eva Waters was successful, the company would get no lease. As oil in Oklahoma is found in pools and as the company's wells had already tapped the pool under the land in controversy, the longer this company could keep rival companies off Eva Waters's land, the more oil could it secure by drainage. If litigation could be prolonged a sufficient period, the company could suck the orange dry and afford to allow Eva Waters to enjoy the desiccated remains. If Eva Waters were ever to enjoy the worth of her allotment of land, immediate possession must be given to her so that her oil company lessee might speedily drill offset wells and save her property from drainage. That was the thought and the cause of the action which renders this a moot case.

Aside from "impossibility of performance," we hope the court will consider the inutility of performance. As suggested in our first brief, appellant has a remedy if he has sustained a wrong; he can endeavor to impress Eva Waters's deed with a trust, by a proceeding in the Oklahoma courts. He requires no "deed" from the appellee to enable him to maintain such an action. If he received such a "deed," no one would recognize its validity or force until, by proper proceedings in an Oklahoma court, he had established its effectiveness. An elementary principle governing issuance of the writ of mandamus is the fact that no other effective remedy obtains to insure relator the enjoyment of his alleged right. Appellant, in this case, wants the land, not a naked deed. There is a way and a place where he can secure the land if it really belongs to him. The place is Oklahoma, and the way is not a proceeding in the District of Columbia for a writ of mandamus.

Respectfully submitted.

OSCAR LAWLER,
Assistant Attorney-General.

F. W. CLEMENTS,
First Assistant Attorney.

C. EDWARD WRIGHT,
Assistant Attorney, Interior Department.

